

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

8/22/77

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALICE CRIMMINS,

Petitioner-Appellant,

-against-

HONORABLE HUGH CAREY, as Governor of the
State of New York, and HONORABLE EDYRS
WOODROFFE, Superintendent, Parkside
Correctional Facility,

Respondent-Appellees.

77-2051

B/A

On Appeal From the United States
District Court for the Eastern
District of New York

BRIEF FOR PETITIONER-APPELLANT

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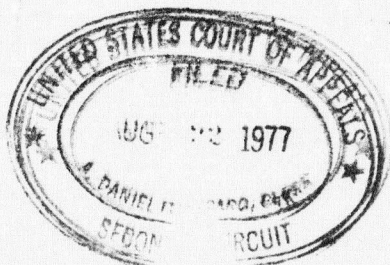


TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	1
Statement of the Case	2
History	2
Facts	4
1. The Prosecutor Attempts to Show Motive and State of Mind	4
2. The Prosecutor Presents a Largely Circumstantial and Sharply Contra- dicted Theory of the Events of July 13 and 14, 1965	7
3. The Witnesses Describe the In- vestigation	17
A. The Missing Carriage, the Missing Lamp, and the "Undis- turbed" Dust	17
B. The Lock, the Future Witness, and the Unidentified Finger- prints	19
C. The "Unfounded" Reports of Prowlers and the Identification of the Girl's Body	21
D. The Unidentified Fiber and the Unaccounted for Food	22
E. The "Not Natural" Death	24
4. Four Witnesses Who Might Have In- fluenced the Verdict	25
A. Detective Kelly Describes His Unsuccessful Attempt to Bargain with Petitioner	25

B.	Joseph Rorech, Under Enormous Pressure and With Immunity for "Anything Anybody Could Think of," Relates Petitioner's "Confessions" to Him	26
C.	Sophie Earomirski, with "Mackell's and Murphy's Boys Right in Back of Me," Displays Selective Total Recall	31
D.	Vincent Colabella is Impeached With His Alleged Exercise of His Fifth Amendment Privilege	37
5.	Significant Motions	39
6.	The Prosecutor's Summation: "She Doesn't Have the Courage to Stand Up Here and Tell the World She Killed Her Daughter"	42
7.	The Court's Charge	46
8.	The Motion for a New Trial: A Potential Defense Witness Diverted	47
POINT I -	THE PROSECUTOR VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT BY DELIBERATELY AND REPEATEDLY COMMENTING IN SUMMATION UPON HER FAILURE TO TAKE THE STAND. THIS CONSTITUTIONAL ERROR, WHICH WAS AGGRAVATED BY OTHER IMPROPER COMMENT, WAS NOT HARMLESS	54
POINT II -	THE FAILURE OF THE PROSECUTOR TO ADVISE DEFENSE COUNSEL THAT A WITNESS HAD COME FORWARD WITH EXCULPATORY EVIDENCE VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL	73
POINT III -	THE SUPERSEDING INDICTMENT ADDING A CHARGE OF MURDER IN THE FIRST DEGREE WAS VINDICTIVE AND THUS A DENIAL OF DUE PROCESS OF LAW	85

	<u>Page</u>
POINT IV - PETITIONER WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR PLACED BEFORE THE JURY EVIDENCE THAT AN ALLEGED ACCOMPLICE HAD PREVIOUSLY EXERCISED HIS FIFTH AMENDMENT RIGHTS BY REFUSING TO WAIVE IMMUNITY	90
CONCLUSION	96

CASES CITED

<u>Application of Kapatos</u> , 208 F. Supp. 883 (S.D.N.Y. 1962)	82
<u>Berger v. United States</u> , 295 U.S. 78 (1935)	61
<u>Blackledge v. Perry</u> , 417 U.S. 21 (1974)	86, 88
<u>Brach v. United States</u> , 542 F.2d 4 (2d Cir. 1976)	81
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	30, 40, 47, 74
<u>Chapman v. California</u> , 386 U.S. 18 (1967)	3, 62, 63, 67, 69
<u>Clark v. Nelson</u> , 411 F.2d 790 (9th Cir. 1969)	65
<u>Devine v. United States</u> , 304 F.2d 93 (10th Cir. 1968), <u>cert. denied</u> , 394 U.S. 1003 (1969)	61
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637 (1974)	59, 60, 61, 70
<u>Giles v. Maryland</u> , 386 U.S. 66 (1967)	83, 85
<u>Grant v. Alldredge</u> , 498 F.2d 376 (2d Cir. 1974)	80, 81, 82, 83, 84
<u>Griffin v. California</u> , 380 U.S. 609 (1965)	54, 56, 58, 59, 60
<u>Griffin v. United States</u> , 183 F.2d 990 (D.C. Cir. 1950).....	84

	<u>Page</u>
<u>Grunewald v. United States</u> , 353 U.S. 391 (1957)	91, 96
<u>Haberstroh v. Montanye</u> , 493 F.2d 483 (2d Cir. 1974)	56
<u>Harrington v. California</u> , 395 U.S. 250 (1969)	62, 63
<u>Hayes v. Cowan</u> , 547 F.2d 42 (6th Cir. 1976) U.S. Appeal Pending	88
<u>Ketchum v. Ward</u> , 422 F. Supp. 934 (W.D.N.Y. 1976)	55
<u>Lefkowitz v. Newsome</u> , 420 U.S. 283 (1975)	72
<u>Moynahan v. Manson</u> , 419 F. Supp. 1139 (D. Conn. 1976)	81
<u>Napue v. Illinois</u> , 360 U.S. 264 (1959)	85
<u>Norris v. Slayton</u> , 540 F.2d 1241 (4th Cir. 1976)	81
<u>North Carolina v. Pearce</u> , 395 U.S. 711 (1969)	86, 88
<u>People v. Crimmins</u> , 26 N.Y. 2d 319 (1970)	3, 39, 66
<u>People v. Crimmins</u> , 33 App. Div. 2d 793 (2d Dept. 1969)	3, 47
<u>People v. Crimmins</u> , 36 N.Y. 2d 230 (1975)	4, 55, 62, 70, 91
<u>People v. Crimmins</u> , 38 N.Y. 2d 407 (1975)	4, 47, 66
<u>People v. Crimmins</u> , 41 App. Div. 2d 933 (2d Dept. 1973)	3, 54, 86, 91 93
<u>People v. Crimmins</u> , 48 App. Div. 2d 663 (2d Dept. 1975)	4
<u>Price v. Georgia</u> , 398 U.S. 323 (1970)	88, 89

<u>Rodriguez-Sandoval v. United States,</u> 408 F.2d 529 (1st Cir. 1969), cert. denied, 414 U.S. 869 (1973)	54, 58
<u>Schultz v. Yeager,</u> 293 F. Supp. 794 (D. N.J. 1967), aff'd, 403 F.2d 639 (3d Cir. 1968), cert. denied, 394 U.S. 961 (1969)	72
<u>United States v. Agurs,</u> 427 U.S. 97 (1976)	65, 74, 77, 79, 80, 81, 82, 83
<u>United States v. Alfonso-Perez,</u> 535 F.2d 1362 (2d Cir. 1976)	62, 70
<u>United States v. Bates,</u> 512 F.2d 56 (5th Cir. 1975)	54
<u>United States v. Curtiss,</u> 330 F.2d 278 (2d Cir. 1964)	72
<u>United States v. Dansker,</u> 537 F.2d 40 (3d Cir. 1976), cert. denied, 97 S.Ct. 732 (1977)	70
<u>United States v. Farnkoff,</u> 535 F.2d 661 (1st Cir. 1976)	70
<u>United States v. Freeman,</u> 514 F.2d 1314 (D.C. Cir. 1975)	63
<u>United States v. Gerard,</u> 491 F.2d 1300 (9th Cir. 1974)	89
<u>United States v. Glasser,</u> 443 F.2d 924 (2d Cir. 1971)	91
<u>United States v. Gleason,</u> 265 F. Supp. 880 (S.D.N.Y. 1967)	83, 84
<u>United States v. Handman,</u> 447 F.2d 853 (7th Cir. 1971)	61, 65, 70
<u>United States v. Jamison,</u> 505 F.2d 407 (D.C. Cir. 1974)	88
<u>United States v. Johnson,</u> 537 F.2d 1170 (4th Cir. 1976)	87, 88

	<u>Page</u>
<u>United States v. Lamerson</u> , 457 F.2d 371 (5th Cir. 1972)	60
<u>United States v. Liddy</u> , 509 F.2d 428 (D.C. Cir. 1974)	59
<u>United States v. Marion</u> , 404 U.S. 307 (1971)	87, 90
<u>United States v. McCrane</u> , 527 F.2d 906 (3rd Cir. 1975), vacated and remanded, 427 U.S. 909 (1976)	79
<u>United States v. McCrane</u> , 547 F.2d 204 (3d Cir. 1976)	79, 80
<u>United States v. Natale</u> , 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976)	91, 92, 94
<u>United States v. Peak</u> , 498 F.2d 1337 (6th Cir. 1974)	70
<u>United States v. Polisi</u> , 416 F.2d 573 (2d Cir. 1969)	83
<u>United States v. Preciado-Gomez</u> , 529 F.2d 935 (9th Cir.), cert. denied, 425 U.S. 953 (1976)	87
<u>United States v. Rapoport</u> , 545 F.2d 802 (2d Cir. 1976), cert. denied, 97 S. Ct. 1551 (1977)	70
<u>United States v. Rosner</u> , 516 F.2d 269 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976)	80, 83
<u>United States v. Sing Kee</u> , 250 F.2d 236 (2d Cir. 1957), cert. denied, 355 U.S. 954 (1958)	91, 94
<u>United States v. Smith</u> , 538 F.2d 1132 (8th Cir. 1976)	81

<u>United States v. Stassi</u> , 544 F.2d 579 (2d Cir. 1976), cert. denied, 97 S. Ct. 1176, 1177 (1977)	81
<u>United States v. Tomaiolo</u> , 378 F.2d 26 (2d Cir. 1967)	80
<u>United States v. Williams</u> , 464 F.2d 927 (8th Cir. 1972)	71, 91
<u>United States ex rel. Cummings v.</u> <u>Miller</u> , 329 F. Supp. 4 (E.D.N.Y. 1971), aff'd, 455 F.2d 714 (2d Cir.), cert. denied, 406 U.S. 927 (1972)	55
<u>United States ex rel. D'Ambrosio</u> <u>v. Fay</u> , 349 F.2d 957 (2d Cir.), cert. denied, 382 U.S. 921 (1965)	55
<u>United States ex rel Leak v. Follette</u> , 418 F.2d 1266 (2d Cir. 1969), cert. denied, 397 U.S. 1050 (1970)	55, 56
<u>United States ex rel. Macon v.</u> <u>Yeager</u> , 476 F.2d 613 (3d Cir.), cert. denied, 414 U.S. 855 (1973)	59
<u>White v. United States</u> , 314 F.2d 243 (D.C. Cir. 1962)	54
<u>Young v. Anderson</u> , 513 F.2d 969 (10th Cir. 1975)	61

STATUTES

N.Y. Crim. Proc. Law § 60.50	86, 87
N.Y. Code Crim. Proc. § 395	86, 87

TREATISE

MCCORMICK, EVIDENCE (2d ed. 1972)	75
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ALICE CRIMMINS, :
Petitioner-Appellant, :

- against - :

Docket No.
77-2051

HONORABLE HUGH CAREY, as Governor of the :
State of New York, and HONORABLE EDYRS :
WOODROFFE, Superintendent, Parkside :
Correctional Facility, :
Respondents-Appellees. :

- - - - - X

On Appeal From The United States
District Court for the Eastern
District of New York

Brief for Petitioner-Appellant

Questions Presented

1. Can the prosecutor's repeated comments on petitioner's failure to testify at her state court trial, comments conceded by the New York Court of Appeals to be constitutional error, be considered harmless in the context of a case resting on dubious circumstantial evidence and seriously challenged witnesses?
2. Did the prosecutor's wilful suppression of material evidence deny petitioner a fair trial?
3. Was the indictment of petitioner for first degree murder of her son a constitutionally prohibited retaliatory action after her successful appeal of her conviction for man-

slaughter of her daughter?

4. Did the above instances of prosecutorial misconduct together with other significant instances of prosecutorial overreaching combine to deny petitioner a fair trial?

Statement of the Case

This is an appeal from an order of the United States District Court for the Eastern District of New York (Dooling, J.), dated December 10, 1976, denying, without a hearing, petitioner's application for a writ of habeas corpus (A.1-22).^{*} By order dated December 21, 1976, Judge Dooling granted a certificate of probable cause and leave to appeal in forma pauperis. On May 5, 1977, this Court assigned counsel to perfect the appeal.

History

On the morning of July 14, 1965, Edmund and Alice Crimmins reported to the police that their two young children were missing. In the early afternoon of the same day, the body of the strangled girl was found. On July 19, 1965, the body of the boy was found. The cause of his death was never determined.

On September 12, 1967, Alice Crimmins was indicted for the first-degree murder of her daughter. She was not at that time indicted for the murder of her son because the District Attorney determined that, based upon the medical testimony,

^{*} Numbers in parentheses preceded by the letter "A" refer to pages in the appendix filed with this Court.

the corpus delicti was lacking. On August 9, 1968, she was convicted after a jury trial in Supreme Court, Queens County (Farrell, J.), of the lesser included offense of manslaughter in the first degree. The conviction was reversed on appeal and a new trial ordered because of the unauthorized visit of three jurors to the street outside the building in which a key prosecution witness, Mrs. Sophie Baromirski, lived.

People v. Crimmins, 33 App. Div. 2d 793 (2d Dept. 1969), aff'd 26 N.Y.2d 319 (1970) (A. 23).

On July 10, 1970, just three months after her successful appeal, the District Attorney obtained a superseding indictment charging petitioner with first-degree murder of her son and first-degree manslaughter of her daughter. On April 13, 1971, she was convicted, after a jury trial in Supreme Court, Queens County (Balbach, J.), of both counts. The judgment was reversed by the Appellate Division, which found that the trial was infected with a series of errors involving prosecutorial misconduct and impermissible cross-examination. The Court held that only the manslaughter count could be retried because the corpus delicti was not established to sustain the murder count. People v. Crimmins, 41 App. Div. 2d 933 (2d Dept. 1973) (A. 26).

The Court of Appeals affirmed as to the murder count, but reversed the Appellate Division as to the manslaughter count. The Court found, that while both constitutional and nonconstitutional error had been committed, the constitutional error was harmless under Chapman v. California, 386 U.S. 18 (1967), and the "nonconstitutional" errors were harmless under

the Court's newly articulated "less exacting" standard. The case was remanded to the Appellate Division for consideration of the facts and of an appeal from a trial court order denying a motion for a new trial based upon the suppression of evidence and newly discovered evidence. Two judges dissented in part. People v. Crimmins, 36 N.Y.2d 230 (1975) (A. 28). On remand, the Appellate Division, by a vote of 3-2, denied relief. People v. Crimmins, 48 App. Div. 2d 663 (2d Dept. 1975) (A. 65). The Court of Appeals affirmed, Judge Fuchsberg dissenting in part. People v. Crimmins, 38 N.Y.2d 407 (1975) (A. 43). Petitioner is presently on a work-release program serving her sentence of from 5 to 20 years for first-degree manslaughter. She has exhausted her presently available state remedies.

Facts

1. The Prosecutor Attempts to Show Motive and State of Mind.

Edmund and Alice Crimmins were married on November 3, 1958 and were separated in February, 1964 (T. 123, 125).^{*} They reconciled shortly after the deaths of the children, but separated and were divorced in August, 1969 (T. 188). There were two children born of the marriage, Edmund, born in October, 1959, and Alice Marie, born in October, 1960 (T. 125). In July, 1965, they were 5-1/2 and 4-1/2 years old respectively. The parents had entered into a separation agreement which

^{*} Numbers in parentheses preceded by the letter "T" refer to pages in the transcript of the second trial, a copy of which is before this Court.

granted custody to Alice Crimmins but which enabled Edmund Crimmins to see the children as often as he wished (T. 126). After the Separation, Mrs. Crimmins continued to live with her children at 150-22 72nd Drive in Queens (T. 124, 126). Mr. Crimmins took a furnished room about one half mile away (T. 126, 138).

Mrs. Crimmins' apartment was a ground-floor, two-bedroom garden apartment in an apartment complex (T. 194, 334-35, 2273). The children shared a bedroom (T. 194). About two years before the deaths, Edmund Crimmins installed a hook and eye on the outside of the children's bedroom door to prevent the boy from raiding the refrigerator early in the morning (T. 198-99).

The two children were healthy, happy, well-fed, well-dressed and well-mannered (T. 132, 855-56, 905, 1487, 1919, 1970, 1980-81, 1991, 1993, 2000, 2222, 2276). They were neither battered nor neglected. They were always together (T. 1919, 1970, 2000-01). The boy was extremely protective of his sister (T. 1970, 1996, 2230-31, 2322). They were also very friendly children (T. 811) who would sit on their window sill and greet passersby (T. 1921, 1972, 1993, 2109, 2275).

In February, 1965, Mrs. Crimmins was seeing one Anthony Grace (T. 760). That month, Grace made his yearly West Indies cruise with three male companions (T. 764, 767, 768). Mrs. Crimmins and a friend inadvertently overstayed the bon voyage party and had to fly back from Nassau three days later (T. 260-61, 768-69).

At this time, Mrs. Crimmins had a live-in maid, Evelyn Atkins (T. 952). The maid, who did not testify at the second trial, apparently notified Mr. Crimmins of his wife's absence (T. 240, 1546). Mr. Crimmins removed the children to his mother-in-law's (T. 243).

In April, 1965, allegedly as a direct result of this incident, Edmund Crimmins began a custody action asking to have the children live with his mother-in-law, petitioner's mother (T. 131-32, 245, 1552). He had threatened the action earlier and, according to Joseph Rorech, a boy friend of petitioner's, petitioner was upset; she did not want the children to grow up like her husband (T. 1550). In June, 1965, according to Rorech, she said she would rather see the children dead than let her husband have them (T. 1553). Mrs. Crimmins consulted Michael LaPenna, a lawyer who did work for Anthony Grace (T. 809). He advised her that, in his opinion, she would not lose custody of the children (T. 2213-15). A custody hearing was scheduled for some date subsequent to July 14, 1965 (T. 155).*

About one week before the death of the children, petitioner assertedly called one Carl Andrade and asked him to talk to Evelyn Atkins about dropping her testimony at the custody hearing (T. 956-58). Petitioner was concerned about the custody hearing; she said she loved her children and wasn't going to give them up (T. 965, 980).

* The date in the record is reproduced as July 12. This apparently is a typographical error. The hearing was apparently scheduled for July 21, 1965 (See Petr's. Exh. 16 [Detective Piering's Notes]).

2. The Prosecutor Presents a Largely Circumstantial and Sharply Contradicted Theory of the Events of July 13 and 14, 1965.

On Tuesday, July 13, 1965, Robert Yoquinto, a neighbor of Alice Crimmins, left for work at about 8:30 A.M. (T. 2275). As he passed by the Crimmins children's bedroom window, he saw them sitting on the sill. They greeted him that morning, as they often had in the past (T. 2281).

At trial, various police officers testified that Mrs. Crimmins told them that at about 2:00 P.M. she called her lawyer, Mr. LaPenna (T. 482, 715). At 2:30, she took the children by car to Kissena Park where they played (T. 482, 548-49, 716). Between 4:00 and 4:30 she used a pay telephone in the park to call her lawyer again (T. 482, 716).

Reportedly, petitioner left Kissena Park at about 5:00 P.M. and drove to a delicatessen on Main Street where she bought frozen manicotti, string beans and some soda (T. 483, 716). She arrived home at about 5:15 (T. 483). At 5:30, she called her lawyer and talked to him about the upcoming custody hearing (T. 484).

Theresa Costello* who often baby-sat for petitioner (T. 1907), played with the children outside and heard the sounds of pots and pans in the kitchen (T. 1908-09). At about 7:30 P.M., the children went in for supper (T. 1910).

Petitioner also reportedly told the police that she fed the children at about 7:30 (T. 484, 529). She fed them mani-

* At the time of the second trial Theresa Costello had married and she testified as Theresa Biava. For clarity, she will be referred to herein as Theresa Costello.

cotti, stringbeans, and either milk or soda (T. 484, 776, 716). Manicotti is a round macaroni stuffed with cheese (T. 553). Detective Piering, who was the principal officer on the case and an important prosecution witness, saw a piece of manicotti in petitioner's refrigerator the next day (T. 513, 553-54).*

According to the testimony, petitioner called Anthony Grace at about 7:30 P.M. (Piering: T. 484) or 5:00 P.M. (Grace: T. 776). He was at a meeting and said he would call her back (T. 484, 776). She then asked the children if they wanted to go for a ride and, at about 8:45 P.M., drove to a Gulf station where she bought \$2.00 worth of gas (T. 484, 716).**

Theresa Costello had a 9:00 P.M. baby-sitting job that night at the Caffiero's, directly across the mall from the Crimmins apartment (T. 840, 1910, 1912). As she passed the children's window, she heard the children saying their prayers (T. 1910-11). She heard both children (T. 1911).

Petitioner reportedly said that she got home somewhere around 9:00 or 9:30 P.M.. She washed the children, put on clean underpants and T-shirts, and put them to bed (T. 485-86, 716-17). She decided to change the screen in the children's room because it had a hole in it. She took the screen from her own bedroom, and discovered that it was dirty. Deciding

* Detective Piering's notes do not mention finding manicotti. However, they do mention finding wine. They mention that twice (Petr's. Exh. 16).

** Lucious Miller, a gas station attendant, said that petitioner did indeed stop for gas but between 5:00 and 6:00 P.M. (T. 757). She had both children with her (T. 757).

that she would wash it in the morning, she put the old screen back, unfastened, and left the children's room (T. 480).

At about 11:00 or 11:30 P.M., she called Anthony Grace at the Capri Bar in the Bronx (T. 780).^{*} According to Detective Piering, she said they talked about the custody proceeding (T. 486). According to Anthony Grace, they discussed the possibility of her joining him at the Capri (T. 780-81). Grace was positive that she did not, during that conversation, ask him for any kind of help; she did not ask him to send anybody over to help her; he did not send anybody (T. 789-90). Beginning in March or April of that year, he had cut down the number of times he was seeing her because he had heard that her husband was around (T. 808-09). He didn't want to "get involved with any family squabble" (T. 809).

Rorech recalled that, at 11:00 P.M., he called petitioner from a bar and tried to get her to come out (T. 1555). She allegedly told him to call back at 2:00 A.M. (T. 1556).

Reportedly petitioner said that, at around midnight, she woke her son and took him to the bathroom, then returned him to bed. She then woke her daughter who rolled over and groaned. She did not take the girl to the bathroom (T. 486, 717). When she left the children's room she fastened the hook, or thought she fastened it (T. 198, 266-67, 287, 480, 487).

Either right before or right after checking on the child-

^{*} It was the theory of the prosecution that the girl was dead before midnight. This theory was derived from coupling petitioner's alleged statements to the police with the medical testimony (T. 792).

ren, petitioner walked the dog (T. 887). During this walk she was seen at about 12:30 by Robert Caffiero, who lived directly across the mall (T. 839-40, 844). She was wearing blue slacks and a flowered blouse. She had rollers in her hair and a kerchief on her head (T. 847).

As Theresa Costello walked home from her baby-sitting job at the Caffiero's, she saw that the screen was leaning against the Crimmins children's window and the porter's carriage was underneath the bathroom window of the man next door (T. 1913-14).

At 1:45 A.M., Mrs. Tina DeVita saw a group consisting of a man, woman, boy and dog emerging from the mall at 110th Street and 72nd Drive as she was driving past with her husband (T. 2468-69). The man was carrying a bundle (T. 2468). The boy was dressed (T. 2490). She did not recognize the people (T. 2475). Mrs. DeVita was seated on the passenger side of the car, the side away from the group (T. 2497). They were about 100 feet away (T. 2499). She had not come forward until well into the second trial, after the prosecution's case was closed, because she was "scared" (T. 2471).

At about 2:00 A.M., Marvin and Betty Weinstein, their two children and their dog left the apartment of Mr. Weinstein's business partner, Anthony King, and walked to their car on 153rd Street (T. 2640-41, 2652, 3014).^{*} The car could well have been parked facing in the wrong direction (T. 2654-55).

^{*} At trial, Anthony King, whose Florida vacation had been interrupted by the prosecutor (T. 2998), and who found it "annoying" to be "pestered on a vacation and coming back and coming back to this," (T. 2996), testified that the Weinsteins were not at his home that night (T. 2955, 2965, 2993, 2996-99). Another witness, Sheldon Weiss, a former associate of King's, said that King had a reputation for being "a liar" (T. 3056-59).

Mrs. Weinstein had dark, shoulder-length hair (T. 2641). The dog was a toy poodle (T. 2641, 2660). Mr. Weinstein carried his daughter bundled up in a blanket (T. 2641). The boy was walking (T. 2660).

At 2:00 A.M., Joseph Rorech, who had had about 12 drinks since lunch time (T. 1630, 2187), claimed he called petitioner as he had been asked to do by her (T. 1556). He let the phone ring seven or eight times. There was no answer (T. 1556).^{*} No one was with him when he made the call (T. 1628). Apparently, he called only once (T. 1556). Martin Baron, Mrs. Crimmins' lawyer at the first trial, testified that when he asked Rorech if he might have dialed the wrong number, or perhaps had not made the call at 2:00 A.M. at all, Rorech acknowledged that he "could be mistaken," but nonetheless insisted on sticking to his story, stating that, "Well, I could be mistaken, but I testified that way to the Grand Jury, and I am going to testify that way at the trial." (T. 2188-89, 2191).

At 2:00 A.M., Sophie Earomirski of 72-21 153rd Street, could not sleep (T. 1081, 1085). She got a drink, worked on a cross-word puzzle, and eventually went to the living room window (T. 1086). As she put out a cigarette on the window sill she saw a man and woman coming out of the mall. The woman was holding a bundle in a blanket with her left arm.

^{*} The only telephone in the apartment was in the living room (T. 514). Petitioner's bedroom had an air conditioner which was running (T. 514). According to Detective Piering, petitioner claimed she was asleep in the bedroom at 2:00 A.M. (T. 487).

and another child with the light (T. 1036). The woman was wearing a short triangular white scarf (T. 1297). Her hair was below her shoulders (T. 1336), and it appeared dark (T. 1294). On July 14, 1965, Mrs. Crimmins' hair was strawberry blond (T. 1922), blondish (T. 2337), red (T. 221), and "just short of her shoulder . . . just shoulder length" (T. 218), or somewhere near the bottom of her ears (T. 813, 1030, 2045).*

The woman then let go of the walking child and held the bundle with both hands. The man was walking about five or six feet in front of her and a dog was running around on the grass (T. 1086). The dog was sniffing on the grass. It was not sniffing at the bundle (T. 1240). The dog had short brown hair (T. 1239). The man told the woman to "hurry up" and she replied that the dog was pregnant. He said, "Did you have to bring it?" (T. 1086).** Then the man took the bundle, swung it under his arm and carried it to a car directly under Mrs. Earomirski's window but facing in the wrong direction (T. 1086-87).

The other child got into the front seat and the man took the bundle from under his arm and threw it into the back seat (T. 1087). Mrs. Earomirski, then 60 feet away (T. 350), heard the woman say, "My God, please don't do this to her." The man

* The street lamps on that street are deficient in the reds so that red generally appears darker or not at all (T. 1030). Although blond hair would appear darker, with the amount of light provided it was still possible to tell that a person was a "reasonable approximation of a blonde" (T. 1394-95).

** During this conversation, the people were over 200 feet away according to the mark Mrs. Earomirski had placed on a diagram (T. 1245). At the first trial, her mark had indicated

replied, "Does she know the difference now" and the woman said, "Please don't say that; don't say that." (T. 1087). The man looked at her and said, "How you're sorry" (T. 1087).

Mrs. Earomirski started to close her window and it squeaked. The woman said that somebody had seen them and they turned and stared up at her apartment. At that moment, another man walked by and the woman greeted him (T. 1087). He continued on (T. 1087-88).

Mrs. Earomirski had withdrawn in back of her drapes while the people were staring up. She had never seen the man before. She had seen the woman before. Although she did not at that time know her name, she said it was Alice Crimmins and she had previously seen her in the neighborhood (T. 1088-89).*

Petitioner did have a long-haired "fluffy" dog which gave birth to a single puppy about two weeks after the deaths (T. 1929, 2285). However, on July 14, 1965, nobody knew that the dog was pregnant. On July 12, 1965, when Mr. Crimmins went to visit the children, the dog looked normal; she did

(cont'd)

that the group was further away because "That's how high I could reach. It was depending how high these charts are" (T. 1243-44). The conversation was in a normal tone of voice but Mrs. Earomirski could hear it. The acoustics are "different" in that area "[b]ecause we are downhill" (T. 1248-49).

* The story as Mrs. Earomirski told it at the second trial represented the culmination of an evolutionary process which began with a letter she wrote to then District Attorney Th' Hentel. The letter, written some sixteen months after the deaths, contained little detail; the first Grand Jury testimony some more, the second Grand Jury more than that.

not look pregnant. When he entered the house, the dog jumped on him and he still could not tell that she was pregnant (T. 214-16, 218, 231). A couple of weeks after the death, the dog had a single puppy (T. 2285). Mr. Crimmins saw the dog the day before she gave birth and still could not tell that she was pregnant (T. 216-17). Several other witnesses testified that they could not tell that the dog was pregnant (T. 855, 976, 1926-27, 1967, 2285). Indeed, a week before the deaths, petitioner had arranged to buy the pick of the litter expected by her neighbor's dog because she wanted a dog for each child (T. 1926, 2279-80). Not a single witness, including the policemen who were called to the house, said that the Crimmins dog looked pregnant.

At 2:15 to 2:30 A.M., Paul Schiralli, a milkman, walked past the Crimmins apartment (a place to which he did not deliver) (T. 913, 937). In the past, when he walked past the apartment, a dog would bark (T. 914-15). This night he claimed the dog did not bark (T. 915). It also did not bark in the next two weeks, notwithstanding the fact that it was still in the Crimmins apartment (T. 217, 940-41, 1930). Mr. Schiralli's testimony was contradicted by Joseph Kruger, another milkman, who said that he never heard the Crimmins dog bark when he delivered to that building (T. 2118).

Petitioner reportedly told the police that after she walked the dog around midnight she returned to her apartment, closed her bedroom door and lay down. At 3:00 A.M. when she had been up for about five or ten minutes, the telephone rang. It was her husband (T. 487). Edmund Crimmins testified that

he called his wife at 3:00 A.M. (T. 143, 717) and asked her if she owed any money to the maid who had worked for her (Evelyn Atkins), and she told him that he seemed "to be pretty buddy, buddy with her . . . Go ask her yourself" (T. 143-44, 487). Her tone of voice was normal (T. 2317-18).

Mrs. Crimmins reportedly said that after the call she left the house with the dog and let it loose while she sat on a wooden railing in front of the door. After five or ten minutes, she returned to the house, locked the apartment door, took a bath and went to sleep between 3:30 and 4:00 A.M. She set the alarm for 8:30 A.M. (T. 487-88, 717).

When she awoke, she dressed, fixed her makeup and hair, straightened up the house, and then opened the children's door at about 9:00 A.M. (T. 286). Either she stated that she had had to unhook the lock to enter the children's room or that she could not recall whether she had had to unhook it (T. 198, 287-88, 480, 719). She reportedly said that the front door was double-locked in the morning (T. 489). The children were gone from their room (T. 488). She called her husband because she thought he might have taken them (T. 488). She asked him if he had the children, saying, "If you took the kids, tell me." He said he had not taken them (T. 146, 718). He told her to go outside and look around for them and that he would be over in a few minutes (T. 146, 489). She looked around and called him again five to ten minutes later (T. 146). She had checked with the neighbors and couldn't find the children. She said, "If you took them, please let

me know. Don't do this to me." He told her he hadn't taken them (T. 146-47, 203), and told her to keep looking, that he would be right over (T. 488).

She took her car and circled the project. Apparently, as she was leaving, she automatically picked up some old clothes of her husband's which she had been planning to dispose of and threw them into the car (T. 503). A neighbor saw her with "winter" clothes that morning (T. 898). The police found a Navy peacoat in her car (T. 504).

At about 9:00 A.M., petitioner knocked on the Costello's door and asked if the children were there. She was on the verge of tears (T. 1916). A building employee who saw her that morning described her as "running all over the mall; she was crying . . . " (T. 2001, 2004-06). On one or two prior occasions the children had walked out early in the morning when the little boy unlocked the front door (T. 1917). Petitioner allegedly was to tell Rorech that the children went out the front door (T. 1561). When Theresa Costello went outside after petitioner came to her door, she saw the screen, now on the ground, and the porter's carriage now under the children's bedroom window (T. 1920-21).

When petitioner returned to the apartment, she met her husband in the parking lot. This was at about 9:30 A.M. (T. 488, 718). He looked around for the children. The screen from the children's window was on the ground beneath the window, the window was wide open, and there was an old carriage that the porter used almost underneath the window (T. 142).

The carriage was used by the porter for breakfast and meals. It was the framework of a carriage with a wooden container in it. He did not remember seeing it under the window before (T. 195-96). He did not check the children's clothing, but he believed their shoes were there (T. 150-51). At 9:40 A.M., they called the police (T. 284, 488).

3. The Witnesses Describe the Investigation

A. The Missing Carriage, the Missing Lamp, and the "Undisturbed" Dust.

When Detective Michael Clifford, then a patrolman, arrived at about 9:50 A.M. (T. 284), he saw on the grass, right at the edge of the sidewalk, a broken carriage with a milk box set in it. A screen was leaning against the wall, under the children's window (T. 285).

The principal officer in the case, Detective Gerard Piering, arrived at 10:40 A.M. (T. 471-72, 535). Piering did not see the carriage (T. 479, 536). It had been removed by one of the handymen and placed in a garbage dumpster (T. 535-37). Men were sent to the garbage dump, "not primarily to look for the carriage," and they did not find it (T. 538).

Piering observed that there was a chest with a lamp on it in front of the window in the children's room (T. 473). He described the lamp as a baseball on a flat circular base topped by a little boy holding a baseball bat (T. 540-41). He said that the top of the chest was covered with dust, but where the lamp had stood, there was no dust; there was a circular spot (T. 477).

This testimony of undisturbed dust, considered significant to refute the possibility that the children had left or had been lured through the window, was sharply disputed. No lamp such as that described by Piering was ever produced. His notes do not describe it (T. 540). He did not safeguard it; he never asked what happened to it (T. 541, 595). According to Edmund Crimmins, the lamp in the children's room had a wood frame with three independent legs about two inches high (T. 225). John Burke, petitioner's brother, never saw a baseball lamp. The lamp was "sort of a tripod lamp" (T. 2332). Although Lieutenant Jacobs recalled the lamp as Piering described it, he was not "substantially connected" with the case after the first 12-14 hours and he did not take notes; detectives take notes (T. 714-15, 726-27, 729, 738-40).

Just as they do not mention the lamp, Piering's notes also do not mention the dust itself. Piering said that they did (T. 542), then altered his testimony (T. 555, 566). No other officer's notes mention the dust (T. 587). Piering did not mention the dust in the first grand jury (T. 587-88). The first mention of it was at the first trial (T. 588). The apartment was examined that day by lab experts for evidence of intrusion. They did not mention dust (T. 597-98). Captain James O'Connor, then a lieutenant, said he arrived at the apartment at about 11:30 A.M. and saw, on the chest, a film of dust and a clear area, 3 to 4 inches in diameter, without dust (T. 684, 688). This witness also remembered petitioner telling him she fed the children at 5:30 P.M. (T.

689). That was a mistake even though he had read his prior testimony within the hour (T. 692-95, 698). He also had misremembered the time she told him she went to get gas (T. 696-97). After that day, O'Connor had nothing more to do with the case (T. 691). He did not take notes. (T. 699-700).

Piering also stated although he did not note, that the window sill was covered with dust and on the sill there was a barrel bank and a bowling trophy (T. 474, 477). However, there were no marks of any kind on the sill (T. 477).

B. The Locks, the Future Witness, and the Unidentified Fingerprint.

The window was a casement window three feet wide by four feet high with one stationary pane of glass and one which opened to a 90° angle (T. 336-37, 477-78). It was 65 inches to the ground outside and about 30 inches to the floor inside (T. 336, 338). The hook and eye outside the door was about 5 feet from the floor (T. 478). The screen from the window was lying on the ground against the building (T. 478). If unhooked, it could be removed from the outside, but according to Piering, "it was very difficult" (T. 605, 611-17). The outside wall was free of scuff marks (T. 479). There were no signs of tampering or jimmying on the outside door to the apartment (T. 479). There was a double lock: one controlled by buttons and the other a bolt which could be opened by a key (T. 480), or by a piece of undetectable plastic (T. 552). Piering said that the locks worked when he tried them (T. 550-51). He made no note of that (T. 551). The

superintendent of the complex stated that the doors would not lock on a snap lock; a key was required to lock or unlock the door (T. 1994-95).

Policemen went through the neighborhood asking people if they had seen the children (T. 289). Clifford covered the area from 150th to 153rd Streets from 72nd Road to 73rd Avenue talking to 100-150 people (T. 289). He did not recall seeing Mrs. Earomirski that day (T. 308). He did not have pictures of the children with him (T. 311), nor did other policemen (T. 310-311).

Mrs. Earomirski said that she was visited at about 5:30 P.M. that day by a policeman who had pictures of the children (T. 1200). He asked her if she had seen the children in the building. He did not ask her whether she had seen them any place else (T. 1201). She did not tell him what she had seen (T. 1207-08). She had heard rumors that a child had been found dead (T. 1201). In fact, at the time the officer was looking for both children, one, the girl, already had been found dead.

The police dusted the apartment for fingerprints (T. 584, 627, 988). One adult print was found on the window which did not match those of Mr. or Mrs. Crimmins (T. 585). They did not check it against the building employees (T. 585). They checked building employees only by name but not by fingerprints (T. 579). They did not check it against Joseph Rorech (T. 585) until during the trial. It was not Rorech's (T. 1790). They never found out to whom it belonged (T. 585).

C. The "Unfounded" Reports of Prowlers and the Identification of the Girl's Body.

Mrs. Crimmins told Piering that about two weeks earlier she had seen a prowler (T. 578, Petr's. Exh. 16). According to Piering's notes, she saw the prowler early in the evening. He was a small, slight Puerto Rican in his 20's (Petr's Exh. 16). Other prowler incidents had been checked and determined to be unfounded (T. 579), although one involved trying to lure two children from a window (T. 579-80). One was determined to be unfounded simply because the four year old child who had been approached could not specifically state what had been said to her (T. 580-81).*

The body of the little girl was found early in the afternoon by a young boy (T. 2593-94) in a vacant lot opposite 71-31 162nd Street about one half mile from the apartment (T. 385, 505). At about 1:45 P.M., Piering took petitioner to the scene (T. 505). He did not tell her the purpose of the trip (T. 505, 567-68). It was to identify the body, which she did (T. 505). Later that day, after the girl's body was found, Theresa Costello described petitioner as "very distraught. She had to have somebody help her walk. She couldn't walk herself." (T. 1923). Her brother described her as "almost dazed" and, in the ensuing weeks, she was "extremely depressed" and wouldn't eat (T. 2334-36). Reportedly, later

* During the summer of 1964, a prowler made obscene remarks to petitioner's neighbor, Mary Butner, through her window (T. 1988). During the trial, the judge strictly limited the scope of defense inquiry into prowler incidents (T. 1969-70, 1982-84, 2548-49).

that day, petitioner told Lieutenant Jacobs that she had once told her husband that "'I want you to understand me, Eddie, you are never going to have these children, no matter what.'" (T. 720). He had no notes; he does not take notes (T. 728).

D. The Unidentified Fiber and the Unaccounted for Food.

The body was examined at the scene by Dr. Richard Grimes at 2:45 P.M. (T. 650). The girl had been dead for 6-12 hours, possibly for as many as 24 hours (T. 657-58). A cloth was tied around her face and mouth (T. 653). There were no signs of sexual abuse (T. 654, 663, 672). There were marks on the neck which did not look like fingernail marks (T. 675-76). Dr. Grimes removed five hairs and fibers from the body (T. 654-55, 673). The girl weighed 35 pounds (T. 675).

Albert Stoholski, a microscopist-chemist with the Chief Medical Examiner's office (T. 1398-99), said that two of the hairs received from Dr. Grimes were dog hairs, three were wool fibers (T. 1402). The dog hairs were consistent with the hair of the Crimmins dog (T. 1405-06). He found that the two red-dyed wool fibers he received from Dr. Grimes were consistent with a dress from the apartment (T. 1407). He could not find a match for the short black wool fiber (T. 1407-08).

Mr. Stoholski also examined the stomach contents. He identified carrots, potatoes, spinach or parsley, lima beans or string beans, something having the color and texture of

peach, macaroni, a wad of chewing gum and many small dark brown fruit seeds ranging from five-tenths to one millimeter (T. 1408, 1422-23). There was no meat (T. 1408). There was nothing which would give any indication of being cheese (T. 1424-25, 1428-29). The macaroni could have been noodles, but there were a large number of them (T. 1426-27). They were larger than just fine noodles (T. 1427):

"I would just like to make one exception to wide noodles. I'm simply saying that these were wider than what you would call a fine noodle. Not necessarily a wide noodle." (T. 1428)

Dr. Milton Helperin, the Chief Medical Examiner of the City of New York, was of the opinion that the girl had been strangled and he tended to think that she had been strangled with the pajama top rather than by hand (T. 1447-47, 1484-87).

The stomach was filled with a large amount of recently ingested food (T. 1460-61). That is, the death of the child occurred not long after the food had been eaten (T. 1462, 1475):

"[W]ith a healthy child, with this much food ingested, . . . the food begins to leave the stomach rather rapidly and . . . after two hours most of the last ingested meal will have passed out of the stomach and into the small bowel, so that what you will find in the stomach is nothing at all or just a small amount of food, you see, but this stomach was full and there was no indication that any of the food passed into the small intestine. Now, it is very difficult to pinpoint time but ordinarily in two hours most of the food will leave the stomach of a healthy child." (T. 1476).

Within one half hour or less of eating some of the food might leave. Within two hours, virtually all of it should have left (T. 1489-92). Dr. Rocco Bevilacqua, who had been

called by the prosecution in the first trial, testified for the defense (T. 2568). He stated that in a healthy child, if no food had left the stomach whatsoever, death would have had to occur in under one hour (T. 2571-72, 2575).

E. The "Not Natural" Death.

On July 19, 1965, the badly decomposed body (T. 1481) of the boy was found in a wooded area off the Van Wyck Expressway a little over one mile from the apartment (T. 385) very close to the sidewalk (T. 436, 2402). He was dressed in an undershirt and shorts and was on a blanket which was not available at trial, having "disappeared" (T. 1480-81). Tire tracks were found near the boy's body. They were never identified. They did not belong to either Mr. or Mrs. Crimmins' car. They were not checked against Rorech's car (T. 582-83). An autopsy was impossible because of the advanced state of decomposition which was consistent with death having occurred on July 14 (T. 1481).

Although Dr. Helperin was not able to determine the cause of death (T. 1481-82), he could not say the death was a natural one:

"And I base my opinion about that, as far as the classification of the type of death, on the circumstances of the death of the sister, the findings and so on. It is a conclusion about manner of death derived from knowledge of the circumstances and cause of death of the sister. So I would say, in my opinion, this was not a natural death." (T. 1482; see also 1505-06).

4. Four Witnesses Who Might Have Influenced the Verdict

A. Detective Kelly Describes His Unsuccessful Attempt to Bargain with Petitioner.

Detective John Kelly testified to a number of conversations he had had with petitioner both before and after the first trial, including one in which she had allegedly said she fed "them kids" at 6:30 P.M. (T. 1032). On cross-examination, Kelly was asked whether he had told petitioner she would get off if she came up with a man who was with her that night. Kelly replied that he "had a suggestion to her as to what what I thought might be of aid to her" (T. 1037). According to Kelly, petitioner did not say to him that she wasn't looking for any deals (T. 1037).

On redirect examination Kelly said that he had told petitioner in May, 1969, that he would discuss with the District Attorney's office the possibility of full immunity on the boy if she would go before a Grand Jury and tell the truth about the boy. He also said that, of course, she'd have to tell the story before she went into the Grand Jury. She said, "'You are asking me to stand up and tell the whole world I killed my daughter. I am not going to do that'." Kelly said he was talking about the boy and petitioner wanted to know about the first trial. And Detective Kelly said that in view of the fact that she would be telling the whole truth, that might be grounds for a new trial or maybe a plea on the first case. He told her that he would be willing to try to get the District Attorney to go along with it. She asked

"Full immunity" and he said yes. She said she would have to talk to her lawyer. Kelly said her lawyer probably would say no because there was "nothing in it for him." Petitioner was going to do it anyway (T. 1040-41).

On recross, Kelly acknowledged that petitioner had not come back to him and asked him to get her a deal (T. 1048). She had gone before a Grand Jury at the request of her own attorney (T. 1045, 1066-67). She had waived immunity (T. 1062-63).

B. Joseph Rorech, Under Enormous Pressure and With Immunity for "Anything Anybody Could Think Of," Relates Petitioner's "Confessions" to Him.

Joseph Rorech first met petitioner in January, 1964 (T. 1533). They went out socially and were intimate from September, 1964 through May, 1965 and from January to October, 1966 (T. 1534-39).

In June, 1966, they had a conversation about the telephone calls he had placed on the night in question (T. 1561-62). He told her that when he called at about 11:00 P.M. he had thought about possibly coming over and she said, "Oh my God, Joe, I wish you had." (T. 1562). When he asked her if she meant that it would not have happened, she said, "yes" (T. 1562). Then he told her he had also wanted to come over at 2:00 A.M. and she said, "No, No" (T. 1563). When he asked her whether it was too late by then she said it was. He did not ask her what she meant by that (T. 1563). Rorech also testified, however, that when he called petitioner at 11:00

P.M. to ask her to join him at a bar, she told him to call back at 2:00 A.M. (T. 1555-56).

In September, 1966, Rorech and petitioner checked into the King's Grant Motor Inn. They had already had some drinks and he brought some scotch and a bottle of champagne to the room. She began to read a newspaper article with the headline "13 Top Hoods Arrested in Queens Restaurant" (T. 1566). Petitioner began to repeat a name over and over (T. 1567, 1570). She said she had never met the man, but had heard his name from Tony Grace (T. 1570). Then, about one half hour later:

"[S]he started crying and she said that 'there was no reason for them to be killed; the reason had been eliminated' and I said to her, 'You mean Evelyn?' and she said, 'Yes,' and then she started saying, 'They're angels in Heaven' . . . and then I said to her, 'Why do you let people point finger[s] at you?' . . . and she finally blurted out, 'What can I do?' . . . and I asked her 'who killed the children?' and she continued to cry and she continued to say 'They will understand, they will know it was for the best' and she repeated this over and over again and then she said, 'Joseph, forgive me, I killed her!' and then she said that 'I didn't want him killed' and then again she repeated, 'They will understand; they know it was for the best; they will understand; they know it was for the best.' This is over a long period of time of several hours. Then she said, 'I agreed' and then she continued to cry, 'They will understand; they know it was for the best . . . ' Eventually we fell asleep and woke up about five o'clock in the morning." (T. 1570-72).

Rorech said that after this he tapered off from seeing the defendant every day (T. 1574), "sort of" because of the King's Grant incident (T. 1721). However, he had told the

Grand Jury it was because she was going out with someone else (T.1722). In fact, after the alleged conversation at the King's Grant, he called petitioner on the telephone although he never spoke to her about her daughter (T. 1616). He went out with her about one or two times a week (T. 1621). He slept with her after that conversation (T. 1622).

At defense counsel's request, the jury heard tapes of telephone conversations between petitioner and Rorech covering the period after the alleged confession (T. 1828-42, 2020-28, 2030-47, 2049-54, 2057-60). The tapes were played for the purpose of showing that Rorech's attitude toward petitioner did not change after the date of the alleged conversation in the King's Grant.

After that, during April, 1968, Rorech had a conversation with petitioner and Harold Harrison, her other lawyer at the first trial, at which time Rorech was asked if he had ever heard the name "Vinnie Corrabella." He said he had not and the lawyer asked him to find out what he could (T. 1580-81). About two weeks later, petitioner showed Rorech some pictures and asked him if he had ever seen the man. He had not. She told him that this was "Vinnie Corrabella" and he was "the man that was with me that night" (T. 1582, 1687-92).*

Sometime in March, 1967, he was in the Red Coach Grill

* Harrison said he had obtained the photographs because he had heard that a certain person had been solicited to testify against petitioner for a sentence consideration (T. 2065). Neither petitioner nor Rorech knew the man whom Harrison identified to them as Vincent Corrabella (T. 2066-67). Rorech said he would try to help (T. 2069).

in Nassau County when Queens District Attorney Moseley appeared and asked him to answer some questions. Rorech answered "most" questions, but refused to answer some. Moseley asked him to go to Queens and Rorech refused. Moseley called a detective who called a patrolman, and the patrolman handcuffed Rorech. They went somewhere in Nassau County. A lawyer called Moseley and Rorech was released (T. 1601-05).

On May 8, 1967, Rorech refused, on the advice of counsel, to testify before a grand jury (T. 1606). On May 18, 1967, he testified under an agreement of immunity (T. 1606-07). The terms of the agreement were not entirely clear. The District Attorney advised the Grand Jury that Rorech would not be prosecuted for any crime which might be revealed by his testimony other than homicide "or for instance the crime of adultery" (T. 1611). The agreement which Rorech understood that he had was "immunity" for "[a]nything other than in connection with the Crimmins case. Anything that anybody could think of" (T. 1612-13) (Emphasis added).

After he received immunity, he still did not tell the Grand Jury that Mrs. Crimmins said "forgive me, I killed her" (T. 1614). He did not tell the Grand Jury that Mrs. Crimmins said "I agreed" (T. 1614-15). Even though he had said nothing, he was "sure he was aware of it" (T. 1615). The first time he ever said petitioner agreed to the killing of the boy was a few days before the first trial (T. 1671). A week to ten days before the trial he told Mr. Harrison that petitioner

didn't do it; she was not capable of it (T. 2070). He did not say a word about knowing anything about the crime (T. 2071).

In October, 1966, petitioner told Rorech that she did not want to see his children hurt through a trial and that if she had to she would tell the police what happened in order to prevent that (T. 1752-53). That apparently was Rorech's explanation for why he had waited so long to implicate petitioner.

On the night of July 13-14, 1965, he had left the Bourbon House with a man whose name he did not know and dropped the man at a motel. Rorech registered because the man was too drunk. The motel card read "Rent a room for two" but Rorech did not stay. He used the name "Ted Justin" and his office address, and eventually he paid the bill (T. 1624-25). He used a lot of aliases in those days, at least four to six (T. 1626-28).

Joseph Rorech was married at the time of the first trial, and had seven children (T. 1583-84). Rorech and his wife separated after his testimony at the first trial (T. 1584). He had not spoken to petitioner since the first trial (T. 1585). At the time of the second trial, Rorech was not to his knowledge a fugitive from the Nassau Police, and an arrest warrant issued March 17, 1970 did not refresh his recollection (T. 1589-90). It was "possibly true" that from February, 1966 on there were a series of judgments against him (T. 1713-

14). There were more than ten. He didn't know if there were more than twenty (T. 1714).

On redirect examination, Rorech was asked whether petitioner's first lawyer had asked Rorech to take "the test" about the 2:00 A.M. phone call, (the reference was to a sodium pentathal test). An objection was sustained. The question was asked again. The objection was sustained again, but a mistrial motion was denied (T. 1738). The prosecutor brought the matter up again during Mr. Harrison's testimony (T. 2074). The Court ruled out any reference to sodium pentathol but allowed the prosecutor to ask if Rorech had been given a test in connection with the 2:00 A.M. call, without revealing the results (T. 2074-83). Harrison had made the arrangements for the test with the prosecutor's office (T. 2084-85). When Harrison was asked if he saw the results, he said he saw a report. A motion for a mistrial was denied (T. 2085-86). The prosecutor tried again to get at the matter when Mr. Baron testified (T. 2201).

C. Sophie Earomirski, with "Mackell's and Murphy's Boys Right in Back of Me," Displays Selective Total Recall.

Sophie Earomirski's snowballing story began on November 30, 1966, some sixteen months after the deaths of the children, with a letter she wrote to then District Attorney Nat Hentel (T. 1094, 1096).

In the letter (T. 1213-14) she said that she had witnessed an incident "on the night before the children were

missing." At about 2:00 A.M., as she was looking out the window, she saw a man and woman walking down the street toward 72nd Road; the woman was walking about five feet behind the man. She was holding "what appeared to be a bundle of blankets that were white under her left arm and was holding a little child walking, with her right hand." The man hollered at her to hurry up and she told him to be quiet or someone would see them. "At that moment, I closed my window, which squeaks, and they looked up, but did not see me."

The man "heaved" the bundle into the back seat; the woman "picked up the little baby" and got into the back. The woman was "thin with dark hair." The man was "tall, not heavy, with dark hair and a large nose." The letter said that this occurred under a street lamp so that the writer could see "quite plainly." The letter was signed, "A Reader" (T. 1214).

At the time she wrote the letter she knew about the Crimmins case by name; she had seen it in the papers (T. 1198-99). She had seen Mrs. Crimmins before; she had seen the children before; she had spoken to a policeman who was questioning neighbors about the missing children (T. 1200-02). She had seen both the woman and child under the street lamp (T. 1204). She did not identify them to the police or sign her letter because she was afraid (T. 1203). She had also been afraid to say that the bundle in the left arm was a child or that the boy was the missing boy (T. 1197, 1220).

She did not say in the letter that there was a dog or

a pregnant dog (T. 1208-09). She did not say in the letter anything about the woman saying "My God, don't do that to her," or the man's reply (T. 1209).*

Although she had said in the letter, "I closed my window which squeaks." at trial she said she meant she tried to close it (T. 1210). She acknowledged she would not have been able to hear any conversation after she closed the window (T. 1210-11).

When she wrote the letter she didn't say the boy was the missing boy because she was afraid to. The letter was anonymous but even so she didn't say who the woman was because she "didn't want to be involved" (T. 1220). Moreover, "these people were watching me" (T. 1221). She was not ill when she wrote the letter but she had the "beebie jeebies" (T. 1222).

After Mrs. Earomirski wrote the letter she was visited by Detective Bill Corbett "and everything poured out of me" including the pregnant dog. "The whole story I told him" (T. 1237). But:

"Q. Did you tell him whom you thought this woman was?

A. He did not ask me.

Q. He didn't ask you if you recognized her, is that right?

A. I don't remember.

Q. But at any rate, you didn't tell Detective

* Edmund Crimmins doubted very much that the boy would not react if someone threw his sister in the car like a sack of potatoes (T. 2322). He was very protective of his sister (T. 1996, 2230-31, 2322).

Corbett that this woman was the same woman whose face I have seen in the newspaper pictures?

A. I don't remember.

Q. You didn't tell Detective Corbett that this woman I saw under the lamp post with that little bundle was the very mother of the children who were missing

A. No.

Q. You didn't tell Detective Corbett that you saw this woman with her own son?

A. I told the detective the woman I saw under the window that night is the same woman I had seen in the area before on previous occasions.

Q. Did you tell him where?

A. Yes.

Q. Didn't you tell him that was the woman you saw in the newspaper pictures?

A. I don't recall." (T. 1238-39).

On June 29, 1967, Mrs. Earomirski had testified for the first time before a Grand Jury (T. 1183). At that time she had been asked whether the child being led was a boy or a girl and she had answered "How should I know" because she was "afraid to say" (T. 1194-95). She did not remember whether she mentioned anything about a dog in the first Grand Jury (T. 1215). She did not mention anything about pregnancy. "I was afraid to get involved" (T. 1215).

By the time of her first Grand Jury testimony she believed she had read a lot about the case; she knew that Alice Crimmins was the mother of the two children (T. 1216-17). She didn't identify Alice Crimmins before the first Grand Jury. She wasn't asked (T. 1218).

In September, 1967, Mrs. Earomirski went to a second Grand Jury and there mentioned Mrs. Crimmins and the pregnant dog (T. 1248). It was the same Assistant District Attorney, James Moseley, on both occasions. He asked some new questions

the second time. She had spoken with him about three times between the two Grand Juries (T. 1249-50).

Mrs. Earomirski's expansive memory about the events of July 14, 1965 was in sharp contrast to her ability to recall her own medical history, and that history threw into serious question her capacity as a witness at all.

On October 16, 1964, she had an accident at work (T. 1186). She reached down to take her pocketbook from the bin where she kept it for safekeeping and a mouse ran up her arm. "[a] little thing with a tail on it - a mouse," and she fainted (T. 1186).

The mouse was yellow. "Because upstairs in the gourmet shop they had a giant cheese which all the mice used to eat and the cheese was yellow and the mouse was yellow, yes sir" (T. 1187).

On May 13, 1965, a Workmen's Compensation hearing was held at which Mrs. Earomirski testified that after the accident her "visibility" was bad, she had severe head pressure and continuous headaches, she was uncoordinated and nauseous and "I just couldn't stand up" (T. 1188).

When asked whether she had said at the hearing that she could not work again because when she tried she was very nervous, had pressure in her head and her hands were shaking and uncoordinated, she could not remember (T. 1189-90).

When asked whether she remembered doctors giving testimony she said "I suppose so" (T. 1191-92).

She did visit a doctor on March 25, 1965, but did not recall his name (T. 1225). She did not recall whether, in February, 1966, her neck swelled up (T. 1226). She did not recall telling a Dr. Greenhall in February, 1966 that she got headaches and was stuttering (T. 1233). She did not tell him she was taking amphetamines. She did not tell him that when she is emotionally excited she gets very bad headaches (T. 1233).

She did get compensation into 1966. When asked whether she was marked as partially disabled even in 1966, she replied that "I don't know what my lawyer put down" (T. 1234). She did go for further examinations in 1966 (T. 1234). After those examinations she continued to get partial disability. She did not remember for how long (T. 1234-35). She did not tell the doctor she was dizzy; she did not recall telling him she was having headaches (T. 1235). She never said her head swells up on the left side when she gets excited (T. 1235-36).

She did not recall saying she had to lie down to get over the headaches; she did not recall saying she couldn't do her work (T. 1236).

In August, 1967 (the month before the second Grand Jury appearance), she did not have to be rushed to the hospital after taking an overdose of librium (T. 1250-51). She did have her stomach pumped (T. 1252). She did not take any librium (T. 1252). She did go to Booth Memorial Hospital; she walked in and walked out (T. 1252-53). The hospital ad-

mission records indicate that she had taken an overdose of tranquilizers and was at the hospital from 8:50 until 11:35 P.M. (T. 1255-56). The pills she took were hormone pills and pills to control hot flashes. "I think I took an extra hormone" and her husband got very upset and they went to the hospital (T. 1265).

She did not recall various medical complaints made on November 20, 1964, December 7, 1964, or December 28, 1964 (T. 1273-74). She did not complain of headache, eyeache or stuttering to Dr. Greenhall on February 24, 1965 (T. 1274). She did not recall stating on March 25, 1965 that the condition was worsening (T. 1275). She did not recall a Dr. Merrin (T. 1275-76). She did not recall further quoted complaints made on January 14, 1965 (T. 1276). She did not hear Dr. Greenhall's testimony at the March, 1965 hearing (T. 1283). She did not recall hearing him say that her symptoms were not typically post-concussion at all but "colored heavily by a neurotic overlay." (T. 1283). Her eyesight was checked and found to be 20/20 (T. 1333).

D. Vincent Colabella is Impeached with His Alleged Exercise of His Fifth Amendment Privilege.

Vincent Colabella was called as a witness by the defense. Before he was sworn he was advised, outside the presence of the jury, of his privilege against self-incrimination and his right to counsel (T. 2718-19). The witness said that he knew his rights and he knew that he did not have immunity (T. 2719-20).

He testified that he had seen the name Alice Crimmins in the newspapers. He had never met her. He was not in the vicinity of 150th Street and 72nd Road on July 13-14, 1965. He never had anything to do with the children of Alice Crimmins (T. 2722-23).

On cross-examination, the prosecutor asked Colabella if, when they had met in November, 1970, Colabella had refused to talk to him. Colabella said no (T. 2725). The prosecutor had given Colabella some "pieces of paper" (T. 2725). At a side bar conference the Court at first refused to let the prosecutor talk about waivers of immunity but then said that, since Colabella was not on trial, he could be questioned on this subject (T. 2726-28).

Colabella said that the prosecutor had told him to give the pieces of paper to his lawyer and he mailed them (T. 2728). Colabella agreed that the pieces of paper were waivers of immunity (T. 2729). The prosecutor asked if he had not told Colabella that before he would be permitted to testify he would have to sign them (T. 2729-30). Colabella said he did not know he had been brought up to testify before a Grand Jury and he was not told that (T. 2731). Colabella, at the time of trial, was serving time in federal prison for selling narcotics. He previously had been convicted of robbery (T. 2733-34).

The furthest the witness had ever been in Queens was Astoria (T. 2734). He did not know Tony Grace (T. 2736). He

had never heard of him (T. 2737). He knew maybe a dozen Sullivans (T. 2739). On July 13-14, he did not get a phone call from Anthony Grace (T. 2740). He did not call a fellow named Ed Sullivan; he did not go to meet Ed Sullivan; he never told Ed Sullivan that he had a friend whose girl friend Alice was in a jam and he had to dispose of a body that night; he never asked Sullivan to help him out (T. 2741-42). He never told Anthony Lombardino (one of the prosecutors at the first trial), and Detectives Kelly and Piering that if petitioner tried to bring his name into this he would say both kids were dead when he got there (T. 2743). They said it to him (T. 2743, 3144-45). Lombardino said that Colabella said it to them (T. 2905). There were no notes made of the conversation (T. 2923). Colabella knew he was not getting immunity (T. 2745).

Anthony Grace had never met or spoken with Colabella (T. 2748-49).

5. Significant Motions

On April 16, 1970, the New York Court of Appeals affirmed the reversal of the first judgment of conviction. People v. Crimmins, 26 N.Y.2d 319 (1970) (A. 23). On June 8, 1970, counsel for petitioner moved to dismiss the original indictment because it charged murder when petitioner could be tried only for manslaughter, and also moved for inspection of the Grand Jury minutes, for a bill of particulars and for various other items of information (T. 37a-44a).

On July 10, 1970, just 3 months after the successful appeal and before the motion to dismiss the indictment had been decided, the two-count superseding indictment was filed (T. 7a-8a). That indictment charged petitioner with the first-degree murder of her son "acting in concert with accomplices unknown to the Grand Jury" (T. 7a). The second count charged her with manslaughter of her daughter (T. 8a).

On January 7, 1971, counsel moved to sever the two counts of the indictment because they involved different crimes, different victims and different days with no allegation of a common scheme or plan. Counsel also argued that the first trial was close and that adding a murder charge would be "devastating and would foreclose any possibility of a fair trial." Moreover it was undisputed that the prosecution lacked evidence that the death of the boy was a result of foul play (T. 62a-67a). The prosecutor opposed the application on the ground that crimes of the same or similar character were involved (T. 68a-71a). On January 14, 1971, the motion was denied, the Court saying, inter alia, that the indictment "clearly indicates that the crimes charged were connected and related together and are of the same or similar character." (T. 74a-76a).

The defense had previously moved, on July 31, 1970, for an inspection of the Grand Jury minutes or dismissal and, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), directing the District Attorney to furnish "all items, information, or

material which may be exculpatory, including all statements, letters, or physical evidence, etc., which may assist defense counsel (T. 26a-28a). In support of the motion on the indictment counsel argued that the charge with respect to the boy was added at the "eleventh hour" after the successful prosecution of appeals, and also that the indictment was defective on its face because it disclosed the absence of proof of death by homicidal means (T. 31a). The Brady material sought was "all statements, letters, physical evidence, etc. which may assist defense counsel or which on any view of the case is inconsistent with the District Attorney's theory of guilt . . . " including items in the possession not only of the District Attorney but also of the police (T. 33a).

In response, the prosecution submitted the Grand Jury minutes to the Court (T. 46a), and acknowledged "their obligations as Officers of this Court" to provide the Brady information requested "if such information was available" (T. 49a).

The Court, after reading the Grand Jury minutes, found that the evidence presented would, if unexplained and uncontradicted, warrant conviction (T. 52a). The Brady motion was granted to the extent that the District Attorney was directed to advise defense counsel in advance of trial of "all relevant exculpatory evidence within his knowledge of possession, if any . . . " (T. 56a).

On the first day of trial, counsel asked again for excul-

patory evidence:

"If there is a letter which purports to contain information concerning the case . . . whether or not the District Attorney dismisses it in his own mind as important or unimportant, if it deals with the subject matter and purports . . .

MR. DEMAKOS: I know my obligation. Judge, he doesn't have to make a speech about it. I'll turn it over to him.

* * * * *

This is about the ninetieth time they made this application I tell you I'll turn over any exculpatory material in my possession." (T. 165-67).

6. The Prosecutor's Summation: "She Doen't Have the Courage to Stand Up Here and Tell the World She Killed Her Daughter"

The prosecutor began his summation by attempting to dispose of the defense witnesses because "a trial . . . is a search for the truth. A trial is not a search for reasonable doubt." (T. 3252-53). Thus, before he got to the "real evidence" (T. 3255), he wanted particularly to dispose of Colabella.

"What did Colabella have to say? You didn't expect Colabella to get on the stand and tell you what happened that night, did you -- a convicted robber, a convicted dope seller." (T. 3255).

* * * * *

Colabella takes the stand and all he says is, "I deny this, I deny that " Of course, he's going to say it Mr. Lyon told you that I could have brought Colabella in. I will tell you I will never bring Colabella into this courtroom. I will never make a deal with a guy like Colabella for his testimony" (T. 3256).

Having disposed of Colabella, the prosecutor went on to

the "significant evidence" against petitioner (T. 3259), including not motive, but state of mind, "how annoyed she was, how nervous she was, how disturbed she was over this custody suit" (T. 3259). And, in addition to her own statements to Piering, the medical evidence and the admissions to Rorech, there was "the confession she made to Detective John Kelly" (T. 3259-60). The following then took place:

"I said, 'Confession, and I mean confession.' Let me read to you what Mr. Lyon referred to you, but I don't think he got the interpretation out of it that I got. 'I suggested to her that she go into the Grand Jury and tell the truth.' What does the defendant answer: 'You mean by the truth, you want me to stand up and tell the whole world I killed my daughter?' That's what John Kelly meant and that's what she knew John Kelly meant."

THE DEFENDANT: I never meant any such thing.
I never --

MR. DEMAKOS: And she said, 'I am not going to do that.' Well, she doesn't have the courage to stand up here and tell the world she killed her daughter.

THE DEFENDANT: Because I didn't kill my children.

MR. DEMAKOS: And the shame and pity of it is that this little boy had to die too.

MR. LYON: I will object to his saying she doesn't have the courage to stand up and say she didn't kill her daughter. I don't know what that means. I ask that be stricken.

THE COURT: Overruled. Go on.

MR. DEMAKOS: She doesn't have the courage to stand up and tell the whole world she killed her daughter, and from that point on --

MR. LYON: Your Honor, I don't understand that. I just don't understand it. What kind of trial do you have? Courage to stand up and say she didn't kill her daughter. She pleaded innocent. Why should

she stand up. She pleaded innocent.

THE COURT: The People have to prove a case beyond a reasonable doubt.

MR. LYON: And her plea is a plea of innocence.

THE COURT: The plea is a plea of innocence. The record so indicates. Go ahead." (T. 3260-62).

About one hundred pages later, very close to the end of the summation, the prosecutor returned to this theme. "Let's go into that conversation about her going into the Grand Jury.

* * * * *

Answer: The exchange, the first exchange from her -- I suggested that she go in and tell the whole truth to the Grand Jury. I also said to her that of course she'd have to tell the story before she went into the Grand Jury. Then she said to me . . . 'You are asking me to stand up and tell the world I killed my daughter. Well, I'm not going to do that.' I told her I was talking to her about the boy. The conversation then was, "Well, what about the first trial, what about the girl.' I said, 'Well, in view of the new situation where you would be before the Grand Jury, now, telling the whole truth, perhaps that would be grounds for a new trial, new evidence, and the possibility -- who knows -- if you tell the whole truth, maybe a plea on the first case.' I told her that I would be willing to talk to the district attorney's office or to try to get them to go along with it. She answered, 'Full immunity?' I said, 'Yes, full immunity.'

* * * * *

MR. DEMAKOS: (Continuing) "Well, I have to talk with my lawyer." What was there to think about if she didn't have anything to do with it? When somebody says that to you, the first reaction would be, "What, are you crazy? What are you asking me to do? I had nothing to do with it." No, she doesn't say that, she says, "I've got to talk it over."

MR. LYON: If your honor please, the testimony is very clear that she says, "I've got to talk it over."

MR. DEMAKOS: What's she got to talk over?

MR. LYON: A new trial, that's what she's got to talk over.

THE COURT: Mr. Lyon, do you have an objection?

MR. LYON: Yes, the objection is that it's unfair comment. It's obvious she's talking about a new trial.

MR. DEMAKOS: It's not obvious what she's talking about, your Honor.

THE COURT: Overruled. Go ahead.

* * * * *

MR. DEMAKOS: (Continuing) What was there to talk about if she had nothing to do with it? Full immunity, she wants.

MR. LYON: Now, if your Honor please, the testimony is very clear. She went into the Grand Jury and waived immunity.

* * * * *

MR. DEMAKOS: (Continuing) Are those the actions or the words of somebody that doesn't know what happened that night? What was she going to discuss? Well, I don't think you can come to any other conclusion about the meaning of those words. She wasn't going to stand up and tell the world she killed her daughter.

MR. LYON: Now, that's -- your Honor, I object to that. She is standing up.

MR. DEMAKOS: She's not standing up now.

MR. LYON: She is. You want her to stand up now?

THE COURT: Do you have an objection?

MR. LYON: I have an objection to this statement that she's not going to stand up and tell the world she killed her daughter. When we pleaded innocent -- we are fighting. We never took a plea, we never turned down pleas.

THE COURT: All right.

MR. LYON: And we are fighting to get fully vindicated.

THE COURT: All right, it's all in the record.

MR. DEMAKOS: (Continuing) But she had to think it over." (T. 3359-64).

7. The Court's Charge

The charge to the jury began the day following the summations and followed standard lines. Notwithstanding the fact that the prosecution had disclaimed that it was trying to prove motive (T. 3259), the court charged that evidence has been presented tending to show motive, and that while such evidence was not necessary it could be evidence of guilt and its absence could tend to create a reasonable doubt (T. 3402-03).

The Court then gave only a general instruction with respect to petitioner's not having testified:

"No defendant in a criminal case is compelled to take the witness stand. By the plea of "not guilty", which this defendant interposed to the indictment, the defendant denied the charges against her and put into issue every material allegation of the indictment. Thereupon, the burden was placed upon the prosecution to prove the guilt of the defendant beyond a reasonable doubt.

"The fact that this defendant did not take the stand in her own defense may not be considered by you as any admission of her guilt, or as any evidence, directly or raising an inference, that she is guilty, because under the law, as I have explained to you, every defendant is presumed to be innocent. In fact, the law specifically provides that a defendant may testify as a witness in his own behalf, but the neglect or refusal of a defendant to testify does not create any presumption against her." (T. 3403-04).

8. The Motion for a New Trial: A Potential Defense
Witness Diverted

On June 21, 1972, appellant moved for a new trial and, in the alternative, for an evidentiary hearing on the motion on two grounds: (1) Prosecutorial suppression of exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and (2) newly discovered evidence (B. 2-3).*

The record before the trial court and each succeeding Court reveals that, in the beginning of June, 1971, Mr. Lyon spoke to an anonymous telephone caller who told him that he had information regarding the Crimmins case which would lead to the real murderer (B. 27). The caller stated that the Crimmins children had been killed by mistake, and that the intended victims were the children of Mrs. Jane Roe (B. 29).** After several such calls, Mr. Lyon was told to contact Assemblyman Emanuel Gold and to ask him about a visit which he had made to the courthouse during the second Crimmins trial with Mrs. Roe (B. 28-29).

Mr. Lyon contacted Mr. Gold, and while Mr. Gold would not reveal Mrs. Roe's identity or tell Mr. Lyon the details

* Numbers in parentheses preceded by the letter "B" refer to pages in the Appendix to the Appellant's Brief in the Court of Appeals in People v. Crimmins, 38 N.Y.2d 407 (1975).

** Mrs. Roe did not conceal her identity from the Judge or Prosecutor. Her real name has not been used in briefs or opinions.

of her story (B. 29-30), he did reveal the following facts: that during the second trial Mrs. Roe confided in him; that on April 15, 1971, Mr. Gold accompanied Mrs. Roe to the courthouse where the Crimmins trial was in progress; that Mr. Gold spoke with Justice Balbach, the presiding justice, in chambers, and told him the details of Mrs. Roe's story; that Justice Balbach referred Mr. Gold and Mrs. Roe to one of the assistant district attorneys in charge of the Crimmins case; and that Mrs. Roe did, in fact, in the company of Mr. Gold, reveal the entire story to the district attorney's office (B. 29).

Defense counsel were unable, however, to learn Mrs. Roe's identity for some time, and only on May 19, 1972 were they able to secure an interview with her (Affirmation of William Erlbaum, Defense Counsel, July 25, 1972, B. 60). Because of her fear for her children, she was not anxious to execute an affidavit, and did not do so until June 21, 1972 (id.). It was only at that time, therefore, that an adequate foundation existed for submitting the motion.

Mrs. Roe's story begins in the Bronx on June 25, 1964. On that date, Mrs. Roe called the police when one of her neighbors, Mrs. Carmen Sierra, threatened to kill her (B. 15). After the police arrived, a detective shot and killed Mrs. Sierra in the presence of her son, Edward, claiming that Mrs. Sierra had attacked him with a knife (B. 15). Edward Sierra threatened to take revenge in kind on Mrs. Roe's children (B. 15).

Because the police took the threats on the lives of Mrs. Roe's children to be very serious,* Mrs. Roe and her family were placed under police protection while they moved from the Bronx, in the utmost secrecy,** to 79-22 147th Street, Kew Gardens, Queens, the same community in which Alice Crimmins and her children lived (B. 15-16). Two of Mrs. Roe's children, a boy and a girl, were roughly the same age as Mrs. Crimmins' children, and the girl's name was Allison (B. 16).

On or about April 19, 1965, Mrs. Roe and her family moved to a garden apartment at 147-26 72nd Avenue, Kew Gardens, Queens, about one block away from Mrs. Crimmins' garden apartment (B. 15). During the last week of June or the first week in July, 1965, Mrs. Roe received a funeral card bearing the name Carmen Sierra and the date, June 26, 1964, the date of Mrs. Sierra's burial (B. 16-17). This sinister reminder of the threats on the lives of Mrs. Roe's children had been forwarded from the first Queens apartment to the second (B.16). Thus, despite the secrecy of the first move, that address had indeed been discovered.

Two weeks after Mrs. Roe received the funeral card, the deaths of the Crimmins children occurred.

*. When Mrs. Roe testified in 1966 at Edward Sierra's trial for assault on a police officer (this incident had taken place at the time of his mother's death) she was permitted to withhold her address (B. 16).

** The furniture was not taken directly to the new residence, but was put in storage first (B. 16).

Mrs. Roe and her husband were certain that their children were the intended victims, and that the murderer had been misdirected from their first Queens apartment to Mrs. Crimmins' garden apartment, just one block away from their second residence (B. 17-18). Like Mrs. Crimmins' apartment, Mrs. Roe's apartment was a garden apartment; like Mrs. Crimmins, Mrs. Roe had a boy and girl roughly the same age as the Crimmins children; the girl's name was Allison and Mrs. Crimmins' daughter was named Alice; like Mrs. Crimmins, Mrs. Roe was of a slight build (B. 18).

On August 5, 1965, Mrs. Roe brought the funeral card to her neighborhood police precinct, the 105th, the same precinct which was investigating the murders of the Crimmins children (B. 18). The police appeared to be very interested in this possible connection to the Crimmins case, and told Mrs. Roe that she would be informed of the results of the investigation (B. 19). No such information was ever forthcoming (B. 19), nor did any of the police reports made in connection with the Crimmins case, which were subpoenaed and examined by defense counsel prior to the second trial, contain any information relating to Mrs. Roe's disclosures (B. 25).

When Mrs. Roe and Mr. Gold went to the District Attorney's office, on April 15, 1971, following the visit to Justice Balbach, she told this entire story to Assistant District Attorney Thomas Demakos, one of the two prosecuting attorneys, in the presence of Detective Gerard Piering, the head detective on the Crimmins case and an important prosecution witness

(B. 21). Mrs. Roe mentioned that she had not been informed of the results of the investigation (B. 21). Detective Piering told Mrs. Roe that her story had been "checked out" and that she should "forget about it" (B. 21). Detective Piering's response seems to indicate that the police had indeed investigated her story in connection with the Crimmins case, yet inexplicably, no report of the investigation appeared in the subpoenaed police reports. The only other alternative was that her story had not, in fact, been "checked out." Mrs. Roe was also told at this time that defense counsel knew about her disclosures (B. 21). Defense counsel did not know.

That Mrs. Roe's story might never have been checked out is evidenced by a visit made to her, subsequent to the conviction and sentencing of Mrs. Crimmins, by Detectives Kelly (one of the detectives assigned to the Crimmins case) and Anderson (B. 22). Mrs. Roe claimed that the detectives' questioning indicated no knowledge of her disclosures (B. 22). This visit followed several WNEW (Channel 5) television broadcasts which referred to the Roe story (B. 22). At the same time that Chief Assistant District Attorney Frederick Ludwig issued a press statement to the effect that the authorities had known of Mrs. Roe's story for years, had checked it out and discounted its pertinence to the Crimmins case (B. 22), Mrs. Roe was being questioned in de novo fashion. Moreover, two days after the visit by Detectives Kelly and Anderson, Mrs. Roe and her husband were asked to come to the District

Attorney's office, where they spoke again with Detectives Kelly and Anderson, and Mr. Nicolosi, the other prosecuting attorney in the second Crimmins trial (B. 23). Mrs. Roe told the entire story for yet another time, and was again told, as she had been on that day in April, that her story had been "checked out" (B. 23).

Defense counsel offered to produce at a hearing proof that the three sons of Carmen Sierra did, in fact, search for Mrs. Roe after she had moved from the Bronx (B. 65).

The only part of Mrs. Roe's story which the prosecutor contradicted dealt with what was told to Mrs. Roe regarding defense counsel. According to the prosecutor, Mrs. Roe was told that she was free to go and see defense counsel, but that Mrs. Roe refused (B. 73-74). At no time, however, did the prosecutor deny that Mrs. Roe was told that defense counsel knew.

In an unsworn, undated set of "Notes", Assemblyman Gold stated that he did not reveal the details of Mrs. Roe's story to Justice Balbach, but only the fact that she had a theory of the crime. Justice Balbach thereupon invited them to visit the District Attorney, defense counsel, or both (B. 55-56).

Mr. Gold also stated that Mrs. Roe was not told to "forget about it," but rather was told that her story had been checked out and found to be irrelevant to the Crimmins case and also was told that she was free to go to defense counsel (B. 56). He also did not deny the allegation that Mrs. Roe was told that defense counsel knew. According to Mr. Gold,

Mrs. Roe said to him that she was "not satisfied that the matter had been checked out" but refused to go see defense counsel (B. 56).

In response to the papers opposing the motion for a new trial, Mrs. Roe re-affirmed the statements made by defense counsel in their respective affirmations that she was told that her story had been checked out and refuted, and that defense counsel already had the information. She was not told that she could go to defense counsel (B. 66).

"And once I was told defense counsel allegedly had the information, since I was reluctant to embroil my family in any risk of danger, I did not go to defense counsel. I was told to forget about it." (B. 66).

Mrs. Roe also stated that she asked to be shown any reports of the results of the investigation, but regardless of the fact that the prosecutor told her, after the conviction, that he would show her the records, no such information was ever forthcoming (B. 67).

Significantly, in the draft of the District Attorney's final affirmation, the following sentence appears:

"Based upon the information available to both the People and the defense, and based upon the People's investigation, Mrs. [Roe's] theory was unsubstantiated in every aspect." (B. 74).

This sentence was omitted in the final affirmation of the same date (see B. 81).

POINT I

THE PROSECUTOR VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT BY DELIBERATELY AND REPEATEDLY COMMENTING IN SUMMATION UPON HER FAILURE TO TAKE THE STAND. THIS CONSTITUTIONAL ERROR, WHICH WAS AGGRAVATED BY OTHER IMPROPER COMMENT, WAS NOT HARMLESS.

Not once, but three times, the prosecutor stated in summation that petitioner "doesn't have the courage to stand up here and tell the world she killed daughter." (T. 3261, 3261-62, 3363). Apparently not satisfied, he drove his point home by insisting, "She's not standing up now" (T. 3363). He thus deliberately and inevitably focused the attention of every juror on the fact that petitioner had not testified, explicitly calling upon the jury to draw an inference of guilt from her lack of "courage" to waive her constitutionally guaranteed right to remain silent. This prosecutorial misconduct was a flagrant violation of the Fifth Amendment. Griffin v. California, 380 U.S. 609 (1965); United States v. Bates, 512 F.2d 56 (5th Cir. 1975); Rodriguez-Sandoval v. United States, 408 F.2d 529 (1st Cir. 1969), cert. denied, 414 U.S. 869 (1973); White v. United States, 314 F.2d 243 (D.C. Cir. 1962).

The Appellate Division reversed petitioner's conviction, finding that the prosecutor's statements were a "grossly improper and prejudicial" attack on her refusal to testify. People v. Crimmins, 41 App. Div. 2d 933 (2d Dept. 1973) (A. 27). The District Attorney conceded in the New York Court of Appeals

that the prosecutor's comments constituted a Griffin violation. (Respondent's Brief at 61). That Court, in turn, unanimously held that the remarks were, in fact, comments on petitioner's failure to testify and constituted reversible constitutional error unless found to be harmless. People v. Crimmins, 36 N.Y.2d 230, 237 (1975) (A. 29). The Court of Appeals found the error to be harmless; the District Court found it "not possible" to say it was prejudicial. In fact, the error was devastating.

1. The Prosecutorial Comments Violated Petitioner's Privilege Against Self-Incrimination.

Unquestionably, the thrice-repeated statement

"she doesn't have the courage to stand up here and tell the world she killed her daughter"

was unconstitutional comment. It was language which was "manifestly intended to be, or was . . . of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

United States ex rel. Leak v. Follette, 418 F.2d 1266, 1269 (2d Cir. 1969), cert. denied, 397 U.S. 1050 (1970). Here, there is no ambiguity, see Ketchum v. Ward, 422 F. Supp. 934 (W.D.N.Y. 1976), nor unfinished statement, see United States ex rel. Cummings v. Zelker, 329 F. Supp. 4 (E.D.N.Y. 1971), aff'd, 455 F.2d 714 (2d Cir.), cert. denied, 406 U.S. 927 (1972), nor benign reference to a "not guilty" plea, see United States ex rel. D'Ambrosio v. Fay, 349 F.2d 957 (2d Cir.), cert. denied, 382 U.S. 921 (1965). These were not comments stressing lack of contradiction, see United States

ex rel Leak v. Fallette, supra at 1270. These were comments addressed to substance rather than to credibility. Contrast Haberstroh v. Montanye, 493 F.2d 483, 485 (2d Cir. 1974).

The comments were not only unmistakable, they were deliberate. The prosecutor was well aware that petitioner had testified at her first trial and that she had waived immunity before the Grand Jury which returned the superseding indictment. He knew that she had considered taking the stand on her own behalf during the second trial, and that she had not done so after a motion to remove the highly prejudicial and irrelevant subject of her sexual affairs from the scope of cross-examination had been denied, the Court saying that he would use his discretion as questioning went along (T. 2357-66). That motion was prompted by the extensive and indeed relentless cross-examination at the first trial. But the principal rationale of the Griffin decision -- the reason why comments upon a defendant's failure to testify are so repugnant to the Constitution -- is that:

"It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him."

Griffin v. California, supra at 613.

Surprisingly, although the District Court devoted half of its opinion to this issue, it is unclear whether the Court found the prosecutor's statements to be Griffin error and held them to be harmless error, or whether he found no Griffin violation at all. In any event, his conclusion that no pre-

judice occurred here, although the result in a "less strange case" might be different, is incorrect both on his own analysis and on the record.

The Court appears to have concluded that the comments on petitioner's failure to testify were not prejudicial because, in effect, the petitioner had testified. After emphasizing that petitioner's detailed statement to the police concerning the events preceding the incident was "critically important in the case," and that eleven of the twenty-one pages of transcript containing the People's opening statement were devoted to a recital of that statement (A. 11), the Court then held:

"It is concluded that the circumstances of the episode deprived it of the prejudicial effect such a statement would have had in a less strange case. Not simply by her outburst, but in a very practical way the petitioner's words--to Fiering and his brother officers, to Kelly, to Rorech--were the core of the case. The jury knew that she had been a grand jury witness. The most telling evidence that the People presented was evidence demonstrating the untruths in petitioner's original, detailed recital to the police. Not so much petitioner's defense case as petitioner's testimony, uncross-examined but much impeached, was what petitioner pressed constantly on the triers of the fact, that and the weakness of the motive, the natural improbability of a woman's killing the children whom she was struggling to retain in her own custody, and the defects of character of the supposed lover who testified to petitioner's alleged confession." (A. 20).

If petitioner's story was the "core of the case," then the prosecutor's comments on her failure to testify were even more prejudicial than they would have been in a "less strange case" because they focused upon, and threw into sharp

relief, the fact that petitioner did not take the stand.* To say that she testified, in effect, through the mouths of the prosecution's witnesses, is to severely beg the issue. For the fact remains that petitioner did not testify and did not subject herself to cross-examination. The very absence of that confrontation is what the prosecutor repeatedly pressed upon the jurors as indicative of her guilt. Indeed, his persistence in repeating the unconstitutional statements proves the importance that he attached to them for pressing his case on the jury. Rodriguez-Sandoval v. United States, supra at 531.

The prosecutor violated Griffin v. California, supra, in still another respect when he hammered away in summation at the fact that petitioner had wanted to consult with her lawyer about an alleged conversation she had had with Detective Kelly regarding immunity in exchange for "the truth." (T. 3359-64). The prosecutor stated:

"'Well, I have to talk with my lawyer'." What was there to think about if she didn't have anything to do with it?" (T. 3361).

Over defense objections (T. 3362) he continued, repeating the statement:

"What was there to talk about if she had nothing to do with it?" (T. 3362).

*. In this connection it is significant that the jurors requested the testimony of Detectives Piering and Kelly (T. 3528) (which contained the detailed recital of petitioner's statement), but did not request, for example, the testimony of Earomirski or Rorech.

Again, and at the same time that he commented for the third time on petitioner's failure to testify, the following took place:

MR. DEMAKOS: Are these the actions or words of somebody that doesn't know what happened that night? What was she going to discuss? Well, I don't think you can come to any other conclusion about the meaning of these words. She wasn't going to stand up and tell the world she killed her daughter.

MR. LYON: Now, that's -- your Honor, I object to that. She is standing up.

MR. DEMAKOS: She's not standing up now.
(T. 3363, emphasis added).

Griffin v. California, supra, is also violated when a prosecutor comments upon a defendant's exercise of the right to counsel. United States v. Liddy, 509 F.2d 428, 442-45 (D.C. Cir. 1974); United States ex rel. Macon v. Yeager, 476 F.2d 613 (3d Cir.), cert. denied, 414 U.S. 855 (1973). The comments in Macon, in which habeas corpus was granted, were virtually identical to those in this case:

"He gets up the next morning and lo and behold, what does he do? He calls his lawyer. These are acts of innocence?" United States ex rel. Macon v. Yeager, supra at 614 (emphasis in original).

2. The Prosecutor Violated Petitioner's Right to Due Process of Law

Respondent, in the District Court, apparently did not wish to concede that the prosecutor had violated Griffin v. California, supra, and confined his response to arguing that the comment should be analyzed according to, and governed by, the result in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). In that case a remark by the prosecutor to the effect

that he was sure the defense was hoping for a reduced verdict was found not to be a specific constitutional violation and not prejudicial. There can be no quarrel with that holding, but it does not alter the fact that the prosecutor here deliberately violated Griffin v. California, supra. The Supreme Court has carefully distinguished per se violations of the Constitution from general claims of a denial of due process:

"This is not a case in which the state has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, Argersinger v. Hamlin, 407 U.S. 25 (1972), or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. Griffin v. California, 380 U.S. 609 (1965). When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here, the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, supra at 643.

The significance of Donnelly to this case is that not only did the prosecutor violate the specific guarantee at issue in Griffin, but he violated the general due process guarantee of Donnelly as well. The comments that petitioner did not have the courage to tell the world she killed her daughter are not only comments on her failure to testify, they are also expressions of the prosecutor's own belief in her guilt. Such expressions have been held to be reversible error, United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972),

and, at the very least, universally condemned as violating a prosecutor's duty as the representative of an impartial sovereignty. See, e.g., Donnelly v. DeChristoforo, supra; Berger v. United States, 295 U.S. 78 (1935); Young v. Anderson, 513 F.2d 969 (10th Cir. 1975); United States v. Handman, 447 F.2d 853 (7th Cir. 1971); Devine v. United States, 304 F.2d 93 (10th Cir. 1968), cert. denied, 39 U.S. 1003 (1969). The Appellate Division considered the comments "an improper assertion by the prosecutor that he knew defendant was guilty" and held that that fact aggravated the Griffin violation (A. 27).

The result reached by the Supreme Court in Donnelly appears to rest entirely upon the ambiguity of the one isolated remark in that case and by the fact that the court dealt specifically with the remark in its instructions. Donnelly v. DeChristoforo, supra at 645. By contrast, in this case, clear expressions of the prosecutor's belief in petitioner's guilt were scattered throughout the summation. Nor did the trial court address itself to the offending remarks with "specific disapproving instructions." Donnelly v. DeChristoforo, supra at 645. Rather, all defense objections were overruled, and the trial court gave merely a standard instruction on the presumption of innocence (T. 3382-86) and on the defendant's right not to testify (T. 3403-04). Moreover the court's charge did not even begin until the day after the prosecutor's summation.

3. The Prosecutor's Comments on Petitioner's Failure to Testify Were Not Harmless Error.

Not only were the prosecutor's comments on his belief in petitioner's guilt prejudicial, but his comments on her failure to testify can in no way be construed as harmless error. The Supreme Court has unequivocally held that:

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

See also, Harrington v. California, 395 U.S. 250, 254 (1969).

Moreover, the Court was also explicit in holding that "constitutional error in admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." Chapman v. California, *supra* at 24.

While the New York Court of Appeals held unanimously that the prosecutor's comments constituted reversible constitutional error, People v. Crimmins, 36 N.Y.2d 230, 237 (1975) (A. 29), the majority found the error harmless under Chapman v. California, *supra*. Neither that Court nor the Court below took account of the fact that comments on a defendant's failure to testify, even if they could be considered harmless standing alone, must be weighed in the context of other trial errors (See Points II - IV, *infra*). As this Court held in United States v. Alfonso-Perez, 535 F.2d 1362, 1367 (2d Cir. 1976):

"It is harder to consider these comments in-

significant when they are taken together, as they must be, with the other problems we have discussed." (emphasis added)

See, also, United States v. Freeman, 514 F.2d 1314 (D.C. Cir. 1975).

Furthermore, notwithstanding the admonitions of the Supreme Court "against giving too much emphasis to 'overwhelming evidence' of guilt," Harrington v. California, supra at 254; Chapman v. California, supra at 23, the New York Court of Appeals in large part rested on its view that the proof against petitioner was overwhelming. In fact, the proof was remarkably weak. The story presented was implausible; the credibility of the key witnesses was, at best, shaky. Certainly, respondent has not come close to sustaining his burden of showing otherwise.

The story which the prosecution presented to the jury was that, on July 13, 1965, at 7 or 7:30 P.M., petitioner fed her children manicotti, stringbeans and either milk or soda. Within two hours, but probably within a half hour, she strangled her daughter. Apparently she did this quietly enough not to attract the attention of the neighbors or to upset her son enough so that he attracted the attention of the neighbors, notwithstanding the fact that he was very protective of his sister.

She then, in an unclear sequence, received a telephone call from Joseph Rorech at about 11:00 P.M., made a telephone call to Anthony Grace at about 11:00 or 11:30 P.M. and set her hair in rollers. She talked to Grace about coming out

to meet him, which she wanted to do; she spoke to Boroch about coming out to meet him, which she declined to do. She told Boroch to call her again at 2:00 A.M.

At around midnight, she walked the dog, with her hair in rollers; waved to a neighbor and returned home. She then, apparently, in the next two hours, dressed her son, bundled the body of her daughter in a blanket and combed out her hair. She left the apartment around 2:00 A.M. with her children, living and dead, a man "to the Grand Jury unknown" and a pregnant dog.

The man, impliedly, had come to help her. Instead of parking in the lot directly behind her house, he parked some 600 feet away, under a street light, facing in the wrong direction. As the group proceeded to the car, petitioner carried the bundle, the dead weight of her 35 pound daughter, with one hand and held the apparently docile and undisturbed living child with the other hand. The dog was sniffing on the grass, apparently unconcerned.

From over 200 feet away, Sophie Earomirski heard the man tell petitioner to hurry up and heard her tell him that the dog was pregnant. From 60 feet away, Sophie Earomirski heard petitioner, whom she described as having dark, shoulder-length hair, object as the man heaved the bundle into the car and heard the man say, "Now you're sorry." She watched the group drive away.

By 3:00 A.M. petitioner was back in her apartment with her son's clothes, which impliedly, she disposed of the next morning. She answered the telephone when it rang and spoke

to Edmund Crimmins, the father of the children, in a normal tone of voice. This was the improbable sequence of events the jury was being asked to credit. Moreover, the jury was being asked to believe that all of this had happened because petitioner was "annoyed", "nervous" and "disturbed" about a pending custody action. And, they were being asked to believe it from a series of remarkably vulnerable witnesses.

In assessing the quality of the evidence, account must be taken not only of its general plausibility, but also of the degree to which the witnesses who offered it were vulnerable to attack. See United States v. Handman, supra at 856; Clark v. Nelson, 411 F.2d 790,791 (9th Cir. 1969). See also, United States v. Agurs, 427 U.S. 97, 112 (1976). Obviously, Sophie Earomirski was a critical witness in putting together the prosecution's case. She had come forward sixteen months after the crime with an anonymous letter in which she had said, among other things, that she had closed her window, thus precluding her from hearing any conversation at all. With each appearance to give testimony, she dredged up more detail (see pp. 31-37, supra). Perhaps the coup de grace was her final recollection of the conversation about the pregnant dog. The fact that the dog had given birth was in the newspapers. Not a single witness, interested or disinterested, called by either side, had observed at the time that the dog was pregnant. Petitioner had, indeed, made arrangements to buy another puppy so that each child could have one.

Mrs. Earomirski's ability to remember that night was

in sharp contrast to her ability to remember anything at all about her own claim for compensation which had been litigated, at least in part, after July 13-14, 1965. (see pp.35-37 supra). She demonstrated moreover, a lively imagination and a tendency to make bizarre observations ("The cheese was yellow and the mouse was yellow, yes sir"). She also demonstrated a cavalier disdain for accuracy. (She said, "I closed the window", when she meant "I tried to close the window". She said, "I put the mark there because that's how high I could reach" when she referred to the mark she had placed on the diagram at the first trial, indicating how far away she was when she heard the first conversation). Small wonder that, when the dissenting opinion in the New York Court of Appeals, dealing with the new trial motion, accused the majority of making Mrs. Earomirski's testimony an "error-free cornerstone" of its result, the majority disclaimed virtually any reliance at all on it. People v. Crimmins, 38 N.Y.2d 407, 411 and nn. 1 and 2 (1975) (A. 45).

In that opinion, the Court preferred to rely on petitioner's "confessions" to Joseph Rorech (38 N.Y.2d at 410) (A. 44). This preference is astonishing. The Court had already characterized Rorech's testimony as "seriously challenged" in reversing the first judgment of conviction. People v. Crimmins, 26 N.Y.2d 319, 324 (1970) (A. 24-25). It was no less challenged or more credible at the second trial. Moreover, one of the so-called "non-constitutional errors" at the second trial, the reference to sodium pentathol

affected Rorech's testimony. That error had not been committed at the first trial.

There was ample reason to consider Rorech as having been "seriously challenged." His recital of petitioner's confessions came on the eve of the first trial in 1968 notwithstanding the fact that he had been talking to the police since 1965. He had been promised immunity for crimes not related to the Crimmins case. He had been bullied by the prosecutor's office to the extent of having been handcuffed. He had not slackened in his attentions to petitioner even after her "confession". Although he claimed he had, the telephone tapes belied it. He never pursued the "confession" with her; he never sought details. Moreover, the statement "Joseph forgive me I killed her" (emphasis added) was remarkably tailored to the needs of the first trial and its single murder count. Rorech was not averse to lying ("I used a lot of aliases in those days"); he was vulnerable criminally (see p. 30, supra); he was vulnerable financially (see pp. 30-31, supra); his marriage was vulnerable (T. 2198). If left to decide the case unencumbered by prosecutorial misconduct, a jury could well have believed that Rorech was lying to salvage the best of a bad situation. See Chapman v. California, supra at 25-26.

The Court of Appeals also was impressed by the medical testimony and by Detective Piering's dust. But the medical evidence was, at best, a standoff and Piering's dust illusory.

According to the medical evidence, the girl died between a few minutes and two hours after her last meal. In all probability, she died within substantially less than two hours. No medical evidence was able to fix the time of death.

The prosecutor relied on petitioner's statement that she fed the children manicotti and stringbeans at 7:00 or 7:30 P.M.. The police were able to verify the presence of manicotti in the apartment. The autopsy showed noodles or macaroni, apparently not wide. However, it showed no cheese. Moreover, while it showed stringbeans or lima beans, it also showed carrots, potatoes, spinach or parsley and a "peach-like substance," none of which the prosecution could explain. Since manicotti dough is wider even than a wide noodle, since there was no cheese and since none of the other food was accounted for, it was at least a fair inference that there was no way of knowing when the child had last eaten.

Although he never wrote it down, and he never mentioned it to the Grand Jury, Detective Piering was to recall at the first trial that there was dust on the chest in front of the window and dust on the window sill. He was to recall a small clear circle where a lamp had stood. It was this evidence of undisturbed dust which, in large part, was thought to have "conclusively exploded" the theory of the outside kidnapper (See Point II infra). Again, the evidence was severely challenged. First, a neighbor had seen both children on the windowsill on the morning of the 13th; second, Piering

himself had seen a bowling trophy and a bank on the sill. Yet there were no marks on the sill. Third, the lamp Piering claimed to have seen on the chest was said not to have existed at all.

The window became important because of Piering's testimony that petitioner claimed to have locked both the children's door and the front door, and Piering's further statement that both the snap and bolt locks on the front door worked. But there was testimony that petitioner did not remember whether she had locked the door and further disinterested testimony that the door did not work on a snaplock.

Moreover, petitioner submitted evidence showing inter alia, that if Mrs. Earomirski saw anybody that night it was the Weinstains (pp. 10-11, supra) and that the children were both alive at 9:00 P.M. The Weinstein group matched Mrs. Earomirski's description of the group she saw including the fact that the woman had dark, shoulder length hair. Mrs. Weinstein had such hair. Mrs. Crimmins did not.

In short, the prosecution's case rested on an implausible theory derived from ambiguous and seriously challenged circumstantial evidence, much of which was highly remote from any incriminating fact and proffered through witnesses whose credibility was highly suspect. Under such circumstances, the constitutional error committed was not "harmless beyond a reasonable doubt." Chapman v. California, supra.

The Court of Appeals thought there were additional reasons

why the prosecutor's comments were harmless error, citing petitioner's "unsworn outburst", comments by defense counsel and the "courtroom reaction," and the "clear instructions" of the trial judge. People v. Crimmins, 36 N.Y.2d 230, 237 (1975) (A. 30). The District Court was less impressed with the instructions but did speak, somewhat inaccurately, of the "curative effort" of the trial judge. He also referred to "the total circumstances of the trial and the evidence" and, puzzlingly, of "the absence of a motion for a mistrial at the close of the summation." (A. 20-21).

A prosecutor's comment on a defendant's failure to testify can be cured, if at all, only by a prompt, explicit instruction specifically addressed to the offending comment, so as "promptly to erase any prejudice harbored by the jury." United States v. Handman, *supra* at 855. See, e.g., United States v. Alfonso-Perez, 535 F.2d 1362 (2d Cir. 1976); United States v. Dansker, 537 F.2d 40 (3d Cir. 1976), *cert. denied* 97 S.Ct. 732 (1977); United States v. Farnkoff, 535 F.2d 661 (1st Cir. 1976). Even when the comment is not a *per se* constitutional violation, prompt, specific instructions is required. Donnelly v. DeChristoforo, *supra*; United States v. Rapoport, 545 F.2d 802 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1551 (1977); United States v. Peak, 498 F.2d 1337 (6th Cir. 1974).

In this case, the "trial court dealt weakly with the event as it occurred." (A. 19). There was no prompt curative

instruction. There was no prompt instruction at all. Moreover, the court's charge did not even begin until the day after the prosecutor ended his summation. Thus, the jury returned home, uninstructed, with the adverse implications generated by those comments fresh in their minds.

When the court did charge on the defendant's right not to testify, he did not specifically refer to the offending comments. His standard instruction (T. 3403-04) was totally ineffective in curing the damage. The instruction was not helped by the fact that it was followed immediately by a reminder that there had been a previous trial (although the purpose was to tell the jury not to consider it) and then buried in the Court's marshalling of the facts (T. 3404-06). In fact, the very persistence of the comments would have made the best instruction futile. United States v. Williams, 464 F. 2d 927, 931 (8th Cir. 1972).

The Court of Appeals also apparently felt that petitioner's "outbursts" either offset or justified the prosecutor's comments. That was incorrect. Petitioner's blurting out "I never meant any such thing" (stopping hastily short) after the prosecutor had referred to her statement to Detective Kelly as a "confession" (T. 3260) in no way justified the prosecutor's then proceeding to tell the jury that petitioner "doesn't have the courage to stand up here and tell the world she killed her daughter." (T. 3261).

It was only after this first comment that petitioner said

"Because I didn't kill my children." (T. 3261). The prosecutor then twice repeated his comment, added his rhetorical question about why she needed a lawyer and crowned his performance by driving home the fact that "She's not standing up now" (T. 3363).

Certainly, a fleeting lapse of control at the end of a long trial, and a second trial at that, did not justify the prosecutorial misconduct. The prosecutor could have objected; he could have asked for an admonition. He had no right to do what he did. Schultz v. Yeager, 293 F. Supp. 794 (D. N.J. 1967), aff'd, 403 F.2d 639 (3d Cir. 1968), cert. denied, 394 U.S. 961 (1969). See also United States v. Curtiss, 330 F.2d 278 (2d Cir. 1964).

The District Court suggests that the absence of a motion for a mistrial at the end of the prosecutor's summation is somehow significant. If by this statement the Court is suggesting a waiver, the conclusion is clearly erroneous. The New York Court of Appeals considered this case on its merits. Lefkowitz v. Newsome, 420 U.S. 283 (1975). The only other possible significance is that it represents a finding that defense counsel did not consider the incident important and that it, therefore, was not important. This conclusion is also very clearly without merit, as each comment was followed by vigorous, though unsuccessful, defense objections (T. 3261, 3262, 3363).

POINT II

THE FAILURE OF THE PROSECUTOR TO ADVISE DEFENSE COUNSEL THAT A WITNESS HAD COME FORWARD WITH EXCULPATORY EVIDENCE VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL.

According to the New York Court of Appeals, one of the things which damned petitioner was that the prosecution had "conclusively exploded" the defense theory of an outside kidnapper 36 N.Y.2d at 243 (1975) (A. 35). Since a defendant's failure to maintain an alternative theory of how a crime was committed is not itself evidence of guilt, that condemnation can mean only that, weighed against what the Court viewed as evidence of petitioner's guilt, evidence of an outside kidnapper was not persuasive. The statement does represent a recognition that the outside kidnapper theory was relevant to the material proposition of guilt or innocence and that, obviously, a more persuasive presentation of the theory could have affected the outcome of the case.

There was, indeed, little evidence at trial to support a theory of an outside kidnapper, although what there was was tantalizing (see p. 21, supra). The most tantalizing, and as it subsequently developed, the most directly relevant, piece of evidence in this regard was the passage in Detective Piering's notes that petitioner had, two weeks before July 14, 1965, seen a small, young Puerto Rican man prowling about in the early evening.

There was much more persuasive evidence to support the

theory of an outside kidnapper. The prosecution suppressed it. While trial was still in progress, Jane Roe told her story to the Assistant District Attorney in charge of the Crimmins case and to Detective Piering. It remains undisputed that Mrs. Roe was told that defense counsel knew of her story when, in fact, the defense did not know even of her existence. Anonymous calls followed by a timid and terrified Mrs. Roe finally brought the story to defense counsel's attention. It took over a year to secure an affidavit from her.

The District Court, although conceding that "[i]t might have been wiser for the trial court to have conducted a hearing" found, with no supporting law, that "in final analysis, Jane Roe had no admissible evidence to proffer." (A. 21). In fact, the evidence available from Jane Roe would have served three functions: it would have been separately admissible; it would have been available for cross-examination of Detective Piering; it could have led to more direct evidence. Accordingly, the failure of the prosecutor to disclose Mrs. Roe's story and his wilful concealment of her existence, violated petitioner's right to a fair trial. United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

There can be no question that, as the New York Court of Appeals implicitly acknowledged, the theory of an outside kidnapper was relevant to the material proposition of guilt

or innocence. In fact, the trial court recognized this when it admitted some testimony about prowlers. That evidence was relevant on a theory of outside kidnappers as was the evidence about how the locks worked on the front door and how the window could be opened from the outside (see supra, pp Most relevant was petitioner's own report of a young Puerto Rican prowler two weeks before the crimes. With that foundation and with the uncanny number of coincidences between the two families, Mrs. Roe's disclosures of the threats on the lives of her children were clearly admissible. They would not have been hearsay because they would not have been offered for their truth but for the fact that they had been made. They would have been highly probative of the possibility of an outside kidnapper. See, McCORMICK, EVIDENCE, § 246 (2nd ed. 1972).

Moreover, the prosecutor injected issues of motive and state of mind into the trial.* He concentrated heavily on creating the impression that petitioner's purported state of mind and motive were strong indicia of guilt and, by implication, that no one else had so impassioned a state of mind or so strong a motive. The Roe evidence would have tended

* The prosecutor insisted that he was not offering evidence relating to the custody proceeding as evidence of motive but only as evidence of state of mind (T. 1542, 3259). The trial court, however, charged motive (T. 3402-03), and the jury, thus, had both matters to consider. Moreover, it would have been even more difficult for the jury than it was for the judge to believe that the prosecutor had not made motive an issue.

to negate this impression and would have made the inference of an outside kidnapper plausible enough to cast substantial doubt on what was, in any event, a weak case. Moreover, a kidnapping theory cannot be taken seriously without motive. By the prosecutor's misconduct, the defense was misled into exploring a tenuous theory, sexual abuse, and diverted from one which was far more plausible. Mrs. Roe's story was a factual one. In the context of this case, the inferences it raised were neither so remote nor so speculative as to render the evidence inadmissible.

Moreover, there were serious questions as to Detective Pierings' bias and, hence, his credibility. While he wrote down nothing about dust, he did note, twice, that there was wine in the house; he did note that Mrs. Crimmins was "cold, - not crying" (Petr's. Exh. 16). He was present at the Jane Roe interview; it was to his precinct that the Carmen Sierra funeral card was taken. Piering acknowledged Mrs. Crimmins' report about a prowler. He had checked other prowler reports in what can fairly be characterized as a half-hearted way, but he was not pressed because counsel did not have the material available. Yet Piering's demonstration of bias, when coupled with his selective notetaking and remarkable memory, might well have affected the trial outcome.

Not only was the evidence admissible, but it was sufficiently material to require granting the writ of habeas corpus. The degree to which the suppressed evidence must be

material in order for relief to be granted varies with the degree of specificity of the request which was made.

If the request was specific, the required degree of materiality is less than if the request was general or was not made at all. United States v. Agurs, supra.

Defense counsel in this case made a pre-trial motion for exculpatory evidence, seeking:

"[A]ll statements, letters, physical evidence, etc. which may assist defense counsel or which on any view of the case is inconsistent with the District Attorney's theory of guilt" (T. 33a) (emphasis added).

Clearly, this was a specific request for material which would tend to corroborate appellant's claim of innocence by establishing an alternative theory of the case. Mrs. Roe's disclosures point to a very strong inference that the deaths of the Crimmins children was the result of mistaken identity. Unquestionably, these disclosures fall into the category of information "which on any view of the case is inconsistent with the District Attorney's theory of guilt." Indeed, no claim has ever been made that her disclosures were outside the scope of the defense request.

That the request was specific enough to alert the prosecutor to what was being requested is obvious from the nature of the case and from the events at trial. The Crimmins trials were remarkable for the appearance of witnesses who came forward voluntarily, and late, to aid the prosecution. One of the key prosecution witnesses, Sophie Earomirski, contacted

the District Attorney's office anonymously sixteen months after the deaths of the Crimmins children. She was a surprise witness at the first trial. At the second trial, just three days prior to Mrs. Roe's appearance at the District Attorney's office, and during the defense case, the prosecution was granted an application to reopen its case for another volunteer, Tina DeVita, who had come forward for the first time on April 7, 1971 (T. 2372-73, 2368, 2381, 2383-84, 2460).*

Throughout the trial, counsel sought any evidence of someone else's involvement, until the prosecutor protested at the "ninetieth time." Despite this pattern, however, when Mrs. Roe came forward, just eight days after Mrs. DeVita, with information tending to corroborate appellant's claim of innocence by providing a plausible and compelling alternative theory of the case, the prosecution did not forward this information, notwithstanding the fact that it was exactly what the defense was seeking and he knew it.

Accordingly, Mrs. Roe's disclosures fall well within the standard of materiality set by the Supreme Court where there has been a specific request.

"[I]f the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting

* Marvin Weinstein also came forward voluntarily and late, he went straight to the defense.

the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."

United States v. Agurs, supra at 106.

This case is even stronger than United States v. McCrane, 547 F.2d 204 (3d Cir. 1976)* in which defense counsel requested material "which may be used to impeach prosecution witnesses, including but not limited to any standards used by the Department of Justice, the Treasury Department, the Internal Revenue Service, or the United States Attorney in declining prosecution of similar cases." United States v. McCrane, supra at 207.

After trial, it was discovered that several letters had been written on behalf of a key government witness by the United States Attorney's office describing the witness' conduct in the case. The letters were facially neutral, and contained no evidence of any expectation of favoritism. The Court found, however, that there was an "equally reasonable inference" that the very act of writing the letters under the circumstances constituted favoritism. Moreover, the court pointed out, had the defense known of these letters, "other obvious avenues of inquiry into the relationship between

* Decided on remand from the Supreme Court (427 U.S. 909) (1976). Certiorari was granted to the Government from the original decision, United States v. McCrane, 527 F.2d 906 (3d Cir. 1975), and the Court vacated the judgment and remanded the case for further consideration in the light of United States v. Agurs, supra. On remand, the Third Circuit found it unnecessary to alter its original decision.

the witness and the United States Attorney's Office" would have been opened up. United States v. McCrane, supra at 206. Accordingly the Court held that the letters were material under Agurs. The Court also held that, since it was obvious that the defense was seeking information upon which it might base a claim of preferential treatment of government witnesses, the request was specific.

Even if the request in this case is not considered specific, the Roe evidence meets the Agurs standard for suppression of material which has been requested in general terms. Under Agurs, where the request for material is general, such as a request for "anything exculpatory" or "all Brady material," it must be shown that "the omitted evidence creates a reasonable doubt that did not otherwise exist." United States v. Agurs, supra at 112. This standard represents a shift in focus away from prior law, which had varied the degree of materiality required with the degree of culpability of the prosecutor. United States v. Rosner, 516 F.2d 269 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976); Grant v. Alldredge, 498 F.2d 376, 380 (2d Cir. 1974).

The change in focus, however, is not a change in standard. Thus, the Agurs standard of materiality when there has been a general request is the same as this Court's standard for assessing materiality when there has been negligent non-disclosure. This fact was explicitly recognized by Agurs which cites United States v. Tomaiolo, 378 F.2d 26, 28 (2d

Cir. 1967) as having applied the Agurs standard although "in different language." United States v. Agurs, supra at 113, n. 22. See also Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976); United States v. Smith, 538 F.2d 1332 (8th Cir. 1976); Moynahan v. Manson, 419 F. Supp. 1139, 1145 (D. Conn. 1976). Although two post-Agurs cases decided by this Court have suggested that Agurs represents a change in standard, in both cases the suggestion is dictum and in neither case is the matter fully explored. Brach v. United States, 542 F.2d 4 (2d Cir. 1976); United States v. Stassi, 544 F.2d 579 (2d Cir. 1976), cert. denied, 97 S. Ct. 1176, 1177 (1977).

The identity of standard recognized by the Supreme Court establishes the continued vitality of prior decisions of this Court. That is, the Agurs requirement that the evidence must "create a reasonable doubt that did not otherwise exist" in no way overrules Grant v. Alldredge, supra which holds that there must be a "significant chance" that the evidence "developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." Grant v. Alldredge, supra at 380.

Indeed, this case is very similar to Grant v. Alldredge in which this court ordered a new trial because the prosecutor failed to inform defense counsel that an eyewitness to a bank robbery had identified someone other than the defendant. This court rejected the government's argument that the information was withheld because the investigators were satisfied to

"wash out" this possible suspect, adding that its grant of a new trial did not depend upon any certainty that defense counsel would have uncovered details leading to the other person's possible involvement. Grant v. Alldredge, supra at 382. The possibility of presenting to the jury a theory that one other than the defendant had committed the crime was sufficient to establish materiality, i.e., to raise a reasonable doubt that did not otherwise exist. Clearly, the Roe disclosures, which present a compelling inference of mistaken identity, would have raised a reasonable doubt that did not otherwise exist, or, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. See also Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962).

The evaluation of whether or not a reasonable doubt would have been raised must be made in light of the entire record. United States v. Agurs, supra at 112. The other evidence in this case was such that Mrs. Roe's evidence must have raised a reasonable doubt when viewed against the critical but improbable testimony of Sophie Earomirski, Joseph Rorech and Detective Piering. Indeed, the New York Court of Appeals has, at one time or another viewed askance the testimony both of Rorech and of Mrs. Earomirski although never in the same opinion.

Although petitioner has proceeded on the theory that, in order to succeed, the suppressed evidence must have been admissible, and although the evidence was, in fact admissible, neither the Supreme Court nor this Court has ever expressly held that the constitutional duty to disclose extends only

to clearly admissible evidence. See, e.g., Giles v. Maryland, 386 U.S. 66 (1967); United States v. Rosner, supra; Grant v. Alldredge, supra; United States v. Polisi, 416 F.2d 573 (2d Cir. 1969); United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967) (Frankel, J.).

Quite to the contrary, this Court has consistently adhered to a standard which expressly extends the duty of disclosure to information of an exculpatory nature which would aid defense counsel in preparation for trial. In United States v. Agurs, supra, the Supreme Court rejected the trial preparation standard but only as a standard of materiality (p. 112, n. 20). It did not hold that the prosecution may, with impunity, suppress evidence which, in its view would be inadmissible because, for example, incompetent (as hearsay). It did not hold that inadmissible evidence could not be material to the issue of guilt or innocence.

In fact, the court quoted with apparent approval, the concurring opinion of Mr. Justice Fortas in Giles v. Maryland 386 U.S. 66, 98 (1967):

"This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information."

United States v. Agurs, supra at 109, n. 16.

Mrs. Roe's testimony was in no sense cumulative or known to the defense. It was critical to trial preparation not only for the reasons stated above but also because it could well have led to more direct evidence of another person's guilt. See Grant v. Alldredge, supra. Respondent suggested below that, even with the lapse of time, petitioner had come forward with no new facts. Petitioner, however, had one overworked court-appointed investigator, and only during trial. The Roe information came to counsel after trial. What was required at that stage was a full scale police investigation which apparently was not undertaken. The information was not speculative; it was factual and unchallenged as far as it went. The suppression by the prosecutor made it impossible to go further. As Judge Frankel pointed out in United States v. Gleason, supra at 886:

"[T]he prosecution's duty of disclosure as affirmed in Brady, cannot be limited to materials or information demonstrated in advance to be 'competent evidence.' [citation omitted]. The duty to disclose surely extends to favorable information unknown to the defense -- e.g., the existence of witnesses, . . . an item of knowledge which is not, at least in itself, normally admissible in evidence [T]he Government may not resist disclosure on its own view -- or even on the view of the motion judge before trial -- that it will succeed on debatable evidence theories in blocking admission of the information demanded."

See also Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950): "[T]he prosecution is not to decide for the court what is admissible or for the defense what is useful."

Indeed, the fact that the prosecutor misled Mrs. Roe by telling her that defense counsel knew of her story is sufficient to take the case out of the Agurs rationale altogether. This case is not merely a case of knowing suppression; it is one of deliberate misleading and is far more analogous to Giles v. Maryland, supra and Napue v. Illinois, 360 U.S. 264 (1959) than it is to Agurs.

Finally, the District Court noted that it would have been better for the trial court to hold a hearing on the question. The Court did not see fit to hold such a hearing itself. It should have done so and, at the least, should be ordered to do so now. Essentially, it is petitioner's position that the record indicates that material facts were suppressed. To the extent, however, that a hearing is considered necessary to permit exploration of this issue, that hearing should be held by the District Court.

POINT III

THE SUPERSEDING INDICTMENT ADDING A CHARGE OF
MURDER IN THE FIRST DEGREE WAS VINDICTIVE AND
THUS A DENIAL OF DUE PROCESS OF LAW

When, just three months after petitioner's successful appeal of her conviction for manslaughter of her daughter,*

* The Court of Appeals affirmed on April 16, 1970; the superseding indictment was obtained on July 10, 1970.

the prosecutor obtained a superseding indictment adding a charge of first degree murder of her son, he impermissibly burdened petitioner's absolute right to the appellate process with a retaliatory measure in direct violation of Blackledge v. Perry, 417 U.S. 21 (1974) and North Carolina v. Pearce, 395 U.S. 711 (1969).

The District Court rejected this claim essentially because the murder count was later dismissed and because the two charges were separately indictable. Significantly, the Court in no way disputed the vindictive nature of the superseding indictment but seemed to feel the error had been cured. The cure, however, was constitutionally inadequate.

That the indictment was vindictive is abundantly clear from the circumstances of the case and the prosecutor's own concession. Because the medical examiner could not determine the cause of the boy's death, the prosecutor recognized from the outset that there was no corpus delecti (former N.Y. Code Crim. Proc. § 395, now N.Y. Crim. Proc. Law § 60.50). Between the first and the second trials, no new evidence was discovered to alter that fact. The second indictment states that the boy died "by means to the Grand Jury unknown" (T. 7a); the Appellate Division ordered the count dismissed because there was no corpus delecti. People v. Crimmins, 41 A.D.2d 933 (2d Dept. 1973) (A. 26).

Respondent argued below that the indictment could not have been brought before the first trial because it was only during that trial that critical evidence developed in the form of Joseph Rorech's two words: "I agreed" (Resp. Br, p. 13).

However, Rorech did not say at the first trial that petitioner had "agreed" to the killing of her son. He said it at the second (T. 1572). Rorech did say that he had told the prosecutor this story before the first trial (T. 1671) and the Assistant District Attorney then in charge of the case acknowledged that he knew at the time of the first trial that Rorech could testify about the boy (T. 2905-06). If that information was available before the first trial, and if it was sufficient, there was no excuse at all for not charging both counts the first time around.

In any event, Rorech's statement was not sufficient to establish the corpus delicti since, under New York law, a confession had to be corroborated by proof of death by criminal means and there was no such evidence (former N.Y. Code Crim. Proc. § 395, now N.Y. Crim. Proc. Law, § 60.50).. All the prosecutor had was the medical examiner's speculation that the boy had not died a natural death because the girl had not (T. 1482; see also, 1505). Moreover, any claim that anything Rorech said justified an indictment five years after the fact when Rorech had been available for those five years and had been a prosecution witness already, is untenable. United States v. Marion, 404 U.S. 307 (1971). Absent any new pertinent evidence, the addition of the new charge was impermissible. Compare United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976) with United States v. Preciado-Gomez, 529 F.2d 935, 941 (9th Cir.), cert. denied, 425 U.S.

Indeed, the prosecutor all but admitted that the new charge was added vindictively. As stated in petitioner's state court brief:

"In oral argument counsel for respondent explicitly conceded that: if Mrs. Crimmins had lost the first appeal, the district attorney would not have obtained an indictment against her or prosecuted her for the death of the boy." (Appellant's Consolidated Reply Brief, Appellate Division, p. 34B).

The fact that the indictment was vindictive, or even that it appeared to be vindictive, Hayes v. Cowan, 547 F.2d 42, 44 (6th Cir. 1976); United States v. Jamison, 505 F.2d 407, 415 (D.C. Cir. 1974), necessitated dismissal of the entire indictment, not just of the vindictive portion. This is required by the rationale of both Pearce and Blackledge which proscribe retaliatory tactics because "the fear of such vindictiveness may unconstitutionally deter" the exercise of the right to appeal. Blackledge v. Perry, supra at 28; North Carolina v. Pearce, supra at 724. Petitioner was entitled to appeal her first judgment of conviction free of the fear that a new charge would await her success. United States v. Johnson, supra.

To assert that petitioner has had all she is entitled to is to ignore the real dangers attendant on the re-indictment. Petitioner was entitled to her retrial free of the prejudicial impact of the new count. Indeed, in this respect, this case is no different from Price v. Georgia, 398 U.S. 323 (1970) in which the defendant was charged with first degree murder, convicted of voluntary manslaughter, retried,

after reversal, for first degree murder and convicted again of voluntary manslaughter. The Supreme Court rejected the argument that the defendant stood convicted of a crime for which he could have been convicted in any event pointing out that:

"[W]e cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." Price v. Georgea, supra at 331.

So here, petitioner's right to an unfettered appeal cannot be fully vindicated if she must face trial on an additional charge even if she presently stands convicted only of the original charge. Accordingly, the District Court's reliance on the fact that there were two separate crimes charged misses the point that to allow trial of an additional related charge when no new evidence justifies such a move ~~undercuts~~ the rationale of Blackledge and Pearce. See United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974).

The District Court refused to follow Price v. Georgia, supra because "there was no prejudice at trial other than that which inevitably but lawfully arose from trying together two charges which arose out of the same set of facts" (A.5). But this begs the question. The prejudice which the District Court acknowledges did occur, arose unlawfully because of the retaliatory nature of the joinder. The jury in this case considered both charges and it would be impossible to suppose that the first degree murder charge did not greatly enhance the likelihood of petitioner's conviction by adding

to the weak manslaughter charge a vision of cold-blooded intent. Respondent cannot have this issue both ways. He cannot assert that the two counts were "without question connected and related together" (T. 68a-71a) so as to successfully avoid a severance (T. 72a-76a), and then assert that they were not part of a single criminal episode, see United States v. Marion, supra so as to prevent the tainted joinder from coming under the rationale of Price.

POINT IV

PETITIONER WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR PLACED BEFORE THE JURY EVIDENCE THAT AN ALLEGED ACCOMPLICE HAD PREVIOUSLY EXERCISED HIS FIFTH AMENDMENT RIGHTS BY REFUSING TO WAIVE IMMUNITY

During petitioner's second trial, the prosecutor claimed that a man named Vincent Colabella was petitioner's accomplice in the alleged murder of her son. This testimony was introduced by the prosecutor in his case in chief despite the fact that the superseding indictment, in which the prosecutor had added the charge of first degree murder of the boy (supra POINT III), stated that petitioner had acted "with accomplices unknown to the Grand Jury." (T. 7a) (emphasis added). Not content, moreover, with buttressing this claim of premeditated murder by presenting not only the allegation but also the name of a claimed accomplice to the jury, the prosecutor then insisted that this alleged accomplice -- the man who sup-

posedly had helped petitioner murder her son -- had previously exercised his Fifth Amendment rights during a Grand Jury investigation into the deaths of petitioner's children by refusing to sign waivers of immunity. As the Appellate Division correctly noted in finding the admission of this evidence to be prejudicial reversible error:

"[U]nder the circumstances of this trial, Colabella's refusal to sign such waiver may well have been considered by the jury as an indication of defendant's guilt."

People v. Crimmins, 41 App. Div. 2d 933 (2d Dept. 1973) (A. 26). The New York Court of Appeals also viewed this as error but as "non-constitutional" error and harmless under its newly articulated standard for such error. People v. Crimmins, 36 N.Y.2d 230 (1975) (A. 28).

The tactic pursued by the prosecutor here has consistently been considered impermissible by this Court. United States v. Natale, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976), United States v. Glasser, 443 F.2d 994 (2d Cir. 1971); United States v. Sing Kee, 350 F.2d 236 (2d Cir. 1957), cert. denied; 335 U.S. 954 (1958). See also, United States v. Williams, 464 F.2d 927 (8th Cir. 1972). Indeed, the Supreme Court of the United States has observed that the admission of such evidence has "grave constitutional overtones." Grunewald v. United States, 353 U.S. 391, 423 (1957). As the District Court acknowledged, this Court has "extended the principle of Grunewald." (A. 10):

"This circuit has taken the view that any direct

questioning as to whether a witness had previously invoked his constitutional right to refuse to testify at a grand jury proceeding constitutes trial error. However, the error may be harmless if (1) the witness's testimony were remote from the crime charged and (2) there were no likelihood of confusion in the jury's mind which would link the defendants to the witness's assertion of the privilege."

United States v. Natale, supra at 1171. Under the standard set by this Circuit, the questioning was not harmless error.

Colabella was unquestionably firmly linked in the jury's mind to petitioner through the testimony of Joseph Rorech. Rorech testified that shortly before the first trial, petitioner had shown him photographs of Colabella* and, identifying him by name, allegedly stated, "That's the man that was with me that night." (T. 1582; 1580-82). Subsequently, on cross-examination of Harold Harrison, petitioner's attorney at the first trial, the prosecutor stated that the police had information that Colabella was with petitioner on the night of the crime (T. 2090-91). Over defense objection, the prosecutor asked Harrison if he knew "whether or not Mr. Colabella was out on the streets in July of 1965" (T. 2095). The final link in the chain connecting Colabella to petitioner as her alleged accomplice was forged during the prosecutor's cross examination of Colabella, who had been called as a defense witness:

* Rorech said "Carabella". The prosecutor suggested in summation, therefore, that he had not introduced the name "Colabella" at all (T. 3255). The suggestion strains credulity.

Q. "Did you ever tell this Ed Sullivan that you had a friend whose girl friend, Alice was in a jam and you had to dispose of a body on the evening of July 13th, going into the early morning hours of July 14, 1965?"

A. No, sir.

Q. And ask him to help you out?

A. No.

Q. And that you were doing a favor for a friend?

A. No. (T. 2742)*

On cross-examination, the prosecutor disclosed to the jury, over objection (T. 2726-28) that Colabella had been given waivers of immunity to sign during a pre-trial interview (T. 2725-32). Although Colabella disclaimed knowledge about what the "pieces of paper" the prosecutor gave him were, the prosecutor made sure that the jury knew that they were waivers, that Colabella had not signed them and that he had not testified before the Grand Jury (T. 2728-32).

These disclosures had a direct, prejudicial impact upon the petitioner. The issue upon which Colabella had not waived his Fifth Amendment privilege was his alleged complicity with the petitioner, evidence of which had been placed before the jury on three different occasions. Thus, the jury was asked to conclude that this witness was afraid to incriminate

* Colabella denied knowing petitioner (T. 2722) or Ed Sullivan (T. 2740), and denied having played any role in the crime (T. 2722-2723). No Ed Sullivan was never called as a witness by the prosecution. This entire line of questioning was held to be prejudicial reversible error by the Appellate Division. People v. Crimmins, 41 App. Div. 2d 933 (2d Dept. 1973) (A. 26). (See T. 3571-72).

himself concerning the very crime with which petitioner was charged -- murder of her son "acting in concert with accomplices." (T. 7a).

This could not have been harmless under United States v. Natale, supra. Colabella was so closely related to petitioner in the minds of the jurors that there is no question but that they would link his assertion of the privilege to her, thus exposing her to "the danger that the jury would believe [petitioner] to be guilty because of [her] association with [the witness], who had pleaded the Fifth Amendment." United States v. Sing Kee, supra at 240-241; United States v. Natale, supra.

The District Court dealt with this issue by relying on the alleged inconclusiveness of Colabella's denials and the fact that the relevant cases are all direct federal appeals. The District Court, however, failed to note that what Colabella himself may have lacked in specificity the prosecutor's explicit and persistent questions and, more damaging, his statement in summation that "I will never make a deal with a guy like Colabella for his testimony" (T. 3256), more than compensated for. Thus, even if the jury might have believed from Colabella's testimony that he had not invoked his privilege, the prosecutor's conduct made such belief impossible.

Moreover, by the time Colabella took the stand, the jurors already knew that immunity was directly related to a

witness's refusal to testify. During the cross-examination of prosecution witness Joseph Rorech, the following dialogue had taken place with reference to Rorech's grand jury appearance:

"Q. Did you refuse to testify?

A. On the advice of counsel, yes.

Q. And then did you go again on May 18, 1967?

A. Yes.

Q. And did you testify?

A. Yes.

Q. And did you ask for immunity before you testified?

A. At that time?

Q. Yes, at that time.

A. No.

Q. Did you have an agreement of immunity before you went into the Grand Jury?

A. Certain type of --

Q. I am just asking about immunity. We will go into the type. Didn't you have an agreement that you would get a certain type of immunity before you testified on May 18, 1967?

A. Yes." (T. 1606-1607).

Moreover, the District Court's suggestion that the issue was not of constitutional dimension ignores the fact that petitioner was entitled to a fair trial. The reference to Colabella's refusal was both state error and federal error. The refusal of the New York Court of Appeals to reverse was

based on their finding the error "nonconstitutional" and harmless because there was no "significant" rather than "reasonable" possibility that the error contributed to the conviction, 36 N.Y.2d 230, 242 (1975) (A. 34).

At the very least it would seem that something which is reversible error in any court and is not just an isolated, evidentiary peculiarity raises the issue of prejudice in a due process context. The New York Court of Appeals skirted the issue by segregating the question of a fair trial, which it, of course, acknowledged to be a constitutional right (A. 30), from non-constitutional error. It did so notwithstanding the fact accumulated error can deny a fair trial and notwithstanding the fact that at least the acknowledged error with respect to the waivers has "grave constitutional overtones." Grunewald v. United States, supra.

CONCLUSION

THE DECISION BELOW SHOULD BE REVERSED AND
THE CASE REMANDED WITH INSTRUCTIONS TO ISSUE
THE WRIT OF HABEAS CORPUS. IN THE ALTERNATIVE,
A HEARING SHOULD BE ORDERED WITH RESPECT
TO THE PROSECUTORIAL SUPPRESSION OF EVIDENCE.

Dated: Hempstead, New York
August 19, 1977

Respectfully submitted,

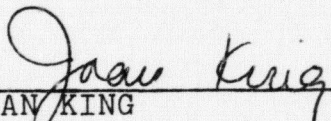
BRENDA SOLOFF
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AFFIDAVIT OF SERVICE BY MAIL

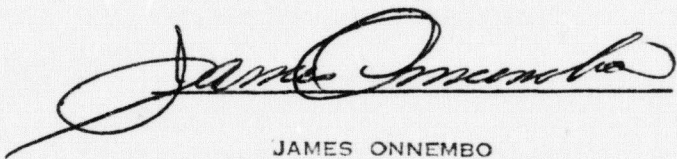
I, JOAN KING, being duly sworn, deposes and says that,

I deposited on August 22, 1977, two copies of the attached brief in an authorized depository for mail, duly stamped and addressed to the Attorney for Respondents-Appellees, Louis J. Lefkowitz, attention of David Birch, Two World Trade Center, New York, New York 10047.


JOAN KING

Sworn to before me this

22nd day of August, 1977.



JAMES ONNEMBO
Notary Public, State of New York
No. 52-4500437
Qualified in Suffolk County
Commission Expires March 30, 1979